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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 18

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION

and

RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES ON REARGUMENT

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BRIEF FOR APPELLEES ON REARGUMENT

This brief is submitted on behalf of appellees for purposes of the reargument of this case in substitution for appellees' original brief. The brief answers the new brief submitted by the Government.

QUESTION PRESENTED

The question presented by this appeal is whether the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is unconstitutionally vague. The clause in issue states:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to

sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (49 Stat. 1528 (1936), 15 U.S.C. § 13a (1959).)

The texts of Sections 1 (Section 2 of the Clayton Act) and 3 of the Robinson-Patman Act are reprinted in the Appendix to this brief.

STATEMENT

Seven counts of the fifteen-count indictment charge that the corporate defendant, National Dairy Products Corporation, sold milk "at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" (Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen, R. 8-9, 12-13, 15-16, 18-19, 22-23, 28-29 and 32-33).[1] One of these counts (Thirteen) makes the same charge against the individual defendant, Raymond J. Wise. Each count also contains an additional paragraph alleging by way of illustration that sales were intentionally made to distributors "at prices below National's cost."

The defendants moved to dismiss these counts on the ground that they rest upon a statutory provision which is so vague as to be contrary to the due process requirements of the Fifth Amendment and to the requirement of the Sixth Amendment that defendants in criminal cases be adequately informed of the accusations against them (R. 52, 68, 71). In an oral opinion the court held that the Robinson-Patman Act counts were based upon a statutory pro-

1. In this brief, the abbreviation "R." refers to the printed Transcript of Record herein, and the abbreviation "G.B.R." refers to the Government Brief on Reargument.

vision which is unconstitutionally "vague and indefinite" (R. 121-22). An order of dismissal was entered, finding the clause of Section 3 "so vague, indefinite and uncertain as to violate the Fifth and Sixth Amendments to the Constitution of the United States" (R. 122-23).

The decision was not an off-hand ruling (R. 87, 90, 121), as the Government seems to imply (G.B.R. 1, 6). Briefs were filed by both the defendants and the Government, and there was extensive oral argument (R. 86-121).

During the oral argument, the trial judge asked whether the charges of the indictment were limited to charges of sales below cost, and was told by Government counsel that they were not (R. 114-16). In view of the language of the indictment and of the interpretation placed upon it by Government counsel, the court in dismissing the indictment construed the charges as being as broad as the language of the statute.

In its Notice of Appeal the Government broadly described the indictment as charging sales at "unreasonably low prices" and stated that the question presented by the appeal is whether prohibition "of unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is unconstitutionally vague (R. 124-25). In its brief, however, the Government has sought to limit the question to whether the statutory clause "as applied to sales made below cost with such purpose" is unconstitutionally vague and indefinite (G.B.R. 3). The brief contends that the relevant counts of the indictment charge only sales below cost, and that even if the language of the statute considered broadly is too vague, it is constitutional at least as applied to such sales.

SUMMARY OF ARGUMENT

I

The "unreasonably low prices" clause is void, because it creates a crime without an intelligible standard for determining guilt. Lacking any definitions, the clause threatens every seller of goods in commerce with criminal guilt for selling at prices which are too low in terms of dollars and cents, but does not provide any means of determining in advance the point at which the seller's price will become illegal. The incongruity of this vague criminal prohibition in the context of the vigorous price competition expected by fundamental antitrust policy increases the intrinsic uncertainty of its meaning. It is natural, therefore, that the "unreasonably low prices" clause is generally viewed as of dubious constitutionality among students of the subject and has already been denominated "vague" by the Court.

The history of this clause fails to supply a meaning for it and in fact greatly increases uncertainty as to the intent of Congress. Copied hastily and verbatim from a Canadian law of a year before and introduced in the Senate as a part of the Borah-Van Nuys bill, an intended substitute for the Robinson-Patman bill, the clause was never explained by any committee or member of Congress. Indeed, it appears that the only members of Congress who expressly referred to it were two members of the House who criticized it as being extremely indefinite in meaning. The conclusion is inescapable that enactment of the clause in issue was virtually inadvertent. Had Congress had an affirmative desire to draft legislation dealing expressly with known problems involving low prices, it would certainly have used far more

specific language and provided far more definite standards and procedures.

The Government agrees that proof of sales at "unreasonably low prices" is an element of the crime which is separate and distinct from proof of "purpose of destroying competition." Accordingly, proof of the requisite purpose cannot be used to give meaning to the otherwise unintelligible concept of "unreasonably low prices." As the Government has quite correctly pointed out, Congress did not rely upon the "purpose" element alone because such a test would jeopardize all vigorous price competition. (G.B.R. 18.)

In an attempt to supply meaning to the clause, which it admits would be difficult for one well versed in the English language to understand, the Government has offered a broad "rational businessmen" test, and a narrower test based on selling "below cost." Upon examination, the board test is as undefined as the statute and, because of its meaningless verbiage, even more confusing. The seemingly narrower contention is no more satisfactory, since selling "below cost" cannot be treated as always equivalent to selling at "unreasonably low prices." The Government attempts to solve this dilemma by calling such sales prima facie unreasonable and requiring the seller to justify them. The result would be to force defendants to try to supply the meaning that neither the statute nor the Government can provide. The Government's "sales below cost" theory is also objectionable because, unless carefully defined, "cost" does not supply a meaningful standard for the advance determination of prices.

The insuperable difficulties in stating a plausible mean-

ing for this clause are illustrated by the serious inconsistencies into which the Government has been drawn in its brief. At one point, the Government states that some prices which are above cost may be illegal, while stating later that one who keeps his price above cost will be safe. Yielding to necessity, the Government acknowledges that there are large numbers of situations in which sellers ordinarily do and should be allowed to sell "below cost," yet it would at the same time call all "below cost" sales "prima facie" illegal. The Government would make selling "below cost" a decisive test, yet it asserts that it is not necessary to have any statutory definition or standards for what is meant by "cost" and how to determine it. It agrees that "unreasonably low prices" and illegal purpose are separate elements of the statutory offense, yet its final position is that the presence of both should be presumed from the mere fact of selling "below cost," which in turn should be presumed from the seller's books, regardless of the accounting methods by which they were kept. These and other shifts in position are the inevitable consequence of trying to instill meaning into a clause which inherently defies any consistent intelligible expression.

Since this case is, as the Solicitor General has said, very nearly the first case under this clause, it is hardly the important antitrust provision that the Government's present brief asserts it to be. Indeed, it is difficult to see how invalidation of the "unreasonably low prices" clause could have any effect at all on antitrust enforcement.

II

A fundamental constitutional principle, under both the due process clause of the Fifth Amendment and the notice

requirement of the Sixth, is that statutory "crime s 'must be defined with appropriate definiteness.' . . . There must be ascertainable standards of guilt." *Winters v. New York*, 333 U.S. 507, 515 (1948). This important civil right, which is "consonant alike with ordinary notions of fair play and the settled rules of law . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), is transgressed by the "unreasonably low prices" clause. This is the clear holding of a long and undeviating line of Supreme Court precedent. Indeed, the criminal proscription against "unreasonably low prices" in issue here is substantially identical to the provision of the Lever Act, prohibiting the wilful making of unreasonable rates and charges, which the Court voided because it did not provide "an ascertainable standard of guilt . . ." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

The same conclusion has since been reached with respect to many criminal statutes legally indistinguishable from the one at issue. The vagueness of "reasonableness" as a measure of prices has resulted in consistent refusal on the part of this Court, and of courts generally, to make judicial determinations, under any statute or other rule of law, of the "reasonableness" of prices charged in any segment of our competitive economy.

The specification of intent found in the "unreasonably low prices" clause adds to its uncertainty and therefore does not remove the constitutional objections. The Government concedes that the intent requirement here is a separate element and that it differs from the willfulness requirement involved in, for example, *Screws v. United States*, 325 U.S.

91 (1945), and that, even if it did not, "willful conduct cannot make definite that which is undefined" (325 U.S. at 105).

The Government now concedes that "it is the adequacy of the statute which must be tested" and that it is the "settled rule that if the challenged provision of the statute is itself so vague and uncertain as to be repugnant to due process, specification of the details of the offense in the indictment will not serve to validate the statute" (G.B.R. 48). But, paradoxically, it continues to urge that the statute should be tested, not on its face, but only as applied in the indictment, and that the indictment here is limited to allegations of "sales below cost." Appellees' answer is two-fold. It is clear from all of the decisions of this Court involving the "vagueness" doctrine that it is the "terms of the penal statute" which "must be sufficiently explicit" to meet constitutional requirements of certainty. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Accordingly, a statute challenged for vagueness must, and heretofore always has been, tested on its face. But even if the rule of law were as the Government states it, it would be immaterial here because the indictment in this case, couched in the language of the statute, was interpreted below, and must be considered for purposes of this appeal, as containing charges as broad in scope as the statute itself.

I. THE "UNREASONABLY LOW PRICES" CLAUSE OF SECTION 3 OF THE ROBINSON-PATMAN ACT IS UNCONSTITUTIONALLY VAGUE.

The "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act makes it a crime "to sell, or contract

to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor" (49 Stat. 1528 (1936), 15 U.S.C. § 13a (1959)). The statute contains no definitions. Yet it provides for penalties of both fine and imprisonment for persons found guilty of transgressing its vague generalities. (See Appendix to this brief.)

The court below held, and it is our position on this appeal, that the Fifth and Sixth Amendments to the Constitution require substantially more definiteness for criminal prohibitions than this provision possesses. Every person is entitled to be notified, in advance and by the language of the statute, of the conduct made criminal in order that he may comply.

This definiteness requirement is a civil right of fundamental importance. A key protection for private citizens against arbitrary criminal prosecution and punishment, it has been carefully guarded by the decisions of the Court. One of its classic statements, in *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), is representative of the long line of decisions before and since that case:

> "That the terms of the penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The "unreasonably low prices" clause through the years has acquired among students of the subject a general repu-

tation for dubious constitutional status. The *Report of the Attorney General's National Committee to Study the Antitrust Laws* 261 (1955) concluded:

> "Doubts besetting Section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law."

The same doubts have beset writers who have specifically studied the "unreasonably low prices" clause and the question of its constitutional validity. Comment, 55 *Mich. L. Rev.* 845, 855 (1957); Comment, *Federal Remedies Available Against One Who Sells At An Unreasonably Low Price*, 9 *N.Y.U. Intra. L. Rev.* 239, 242-44 (1954); Note, 100 *U. Pa. L. Rev.* 1058, 1061-62 (1952); Comment, *The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act*, 49 *Nw. U.L. Rev.* 273, 292-93 (1954); Note, 108 *U. Pa. L. Rev.* 116, 122 (1959).

Indeed, the Court has taken notice of the glaring imprecision of this clause. In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), it premised its decision that Section 3 is not one of the antitrust laws, and therefore not a proper basis for private antitrust suits, in part on the indefiniteness and uncertainty obviously inherent in the "unreasonably low prices" clause, which the Court, per Mr. Justice Harlan, termed "this vague provision" (see full discussion at pp. 61, *infra*).

The Government makes the surprising statement that the clause in issue is an important part of the antitrust laws (G.B.R. 12). But in his original argument on this appeal, the Solicitor General admitted that this is very nearly the

first case to be brought by the Government under this twenty-six year old criminal provision. As recently as 1958, the Court noted in the *Nashville Milk* case that, as far as it could find, the Department of Justice had never made any attempt to use or enforce the "unreasonably low prices" provision (335 U.S. at 378 n.7). The unavailability of this clause to private litigants, its almost complete nonuse by the Government, and its unintelligibility as a guide to business insure that its complete disappearance will not affect antitrust enforcement in the least.

A. The Language of the "Unreasonably Low Price" Provision Is Intrinsically Vague.

The Government concedes that "a stranger well versed in the English language . . . would have difficulty in determining the meaning of the relevant phrases" of this law (G.B.R. 25). It will be shown that this statement is equally true for the sellers who must try to comply with the statute and the courts and juries who might be required to apply it.

The parties are in agreement that three elements of the offense are abstractly outlined by the language of the provision in issue. It must be shown that there was: (1) a sale, or contract for sale, of goods; (2) at "unreasonably low prices"; (3) done "for the purpose of destroying competition or eliminating a competitor" (G.B.R. 11). These are separate and distinct elements, as the Government brief correctly points out, and "unreasonably low prices" and illegal purpose must be separately proved (G.B.R. 20). A violation

2. In fact, we know of only one other indictment brought under this clause, United States v. Fairmont Foods Co., Cr. No. 3634, W.D. Mich., June 23, 1959.

of this clause is not established, we agree, even if it is proved that a seller has sold goods at low prices with the specific purpose of destroying competition. Clearly there must be an additional demonstration that the prices were not only "low," but "unreasonably" low (G.B.R. 18, 20).

The constitutional issue of vagueness of the phrase, "unreasonably low prices," accordingly must be faced independently of whether the "purpose" phrase may be considered sufficiently clear. It follows that the statute's requirement of a purpose to eliminate competition cannot be used to solve doubts and ambiguities about what is meant by "unreasonably low." We also agree with the Government that the most critical problem of vagueness arises as to the phrase "unreasonably low" (G.B.R. 11).

That phrase seeks somehow to put an individual floor under every price charged by every seller of goods in commerce in the United States. Unlike the rest of the Robinson-Patman Act, there is no requirement that the "unreasonably low prices" be accompanied by discrimination. A price statute with less definiteness would be difficult to design. Obviously, no seller can ascertain from this language, no matter how long he might reflect upon it, what his price should be in dollars and cents. Yet sellers must be able to determine with reasonable certainty how low in price they may go without committing a crime, and, under the constitutional requirement of definiteness, they are entitled to know how to do this.

The "purpose" phrase of the statute is also seriously ambiguous, and we cannot accept the Government's assertion that its meaning is "too plain for discussion" (G.B.R. 11).

As the Government itself points out later, because this phrase standing alone is so ambiguous that it would endanger desirable price competition, rather than protect it, Congress did not rely upon it to distinguish between lawful and unlawful prices (G.B.R. 18). Thus, both the "purpose" and the "unreasonably low prices" phrases lack intelligible meaning on their face.

Indeed, whatever meaning and standards the Government claims for this statute are not to be found in the language but are only purported derivations from history, context, and custom. These far-reaching attempts to borrow a meaning for the clause from some extraneous source have been coupled with repeated shifts of basic position ever since the Notice of Appeal. Plainly the Government is finding the "task to make it yield sense" to be, as Representative Celler predicted, truly "herculean" (see p. 18, *infra*).

Because of the position the Government has taken in its revised brief, we turn immediately to these supposed sources of statutory meaning, and in the remainder of this section will show that, far from clarifying the statutory language, the language is in fact incongruous in these contexts. The actual effect is to make the disputed language even more inscrutable than it might at first reading appear to be.

B. The "Unreasonably Low Prices" Clause Received Almost No Attention in Congress and Its History Does Not Clarify Its Meaning Or Indicate Its Purpose.

The vagueness of the "unreasonably low prices" provision is not reduced by reference to its history as the Government

brief intimates (G.B.R. 18, 25). On the contrary, complete study of the history of the enactment of this clause in 1936 reveals that there was practically no discussion whatever in Congress of either its meaning or its purpose, and that it never received any express interpretation by any Congressman responsible for its introduction or enactment. Its vagueness, and the failure of Congress in any way to clarify its meaning, are explained simply by the fact that it was enacted into law with hardly any attention being paid to it in Congress at all.

The language of Section 3, including the clause in issue, was not the product of congressional drafting. Instead, it was copied almost verbatim from a statute passed by the Canadian Parliament in 1935, only a year earlier than the enactment of the Robinson-Patman Act.[3] Thus, unlike other provisions of our antitrust legislation, the language was not drawn from common law or from any prior antitrust legislation or experience of the United States. Moreover, at the time of its enactment by Congress, the Canadian act from which it was copied had received no court interpretation in Canada, and to this date no reported Canadian court case construing its meaning has been found.

The clause was enacted in a tortuous, confusing series

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3. 25 & 26 Geo. 5, c. 56, § 9 (1935). This section, as enacted, was § 498A (later § 412) of the Criminal Code. In amended form, it now appears as § 33A of the Combines Investigation Act (8 & 9 Eliz. 2, c. 45, § 21 (1960)). See *Hearings on S. 4171 Before a Subcommittee of the Senate Committee on the Judiciary*, 74th Cong., 2d Sess. 63 (1936) (hearings on Borah-Van Nuys bill) which are hereinafter cited as "*Hearings.*"

of events.[4] Section 3, which was originally known as the "Borah-Van Nuys bill," was introduced and sponsored in the Senate as a substitute for the original Robinson and Patman bills. The subject matter of all of these bills was price discrimination. The Borah-Van Nuys bill as a whole was given scant discussion, and the "unreasonably low prices" clause, inadvertently interjected into a controversy about how to deal with price discrimination, received virtually no attention.

The Borah-Van Nuys bill was never given hearings by any House committee. The Senate Judiciary Committee nominally held hearings on it, but these actually centered almost entirely on the subject of price discrimination, and far more on the Robinson and Patman bills than on the Borah-Van Nuys bill. None of the 27 witnesses favored the Robinson-Patman proposals, and most endorsed the Borah-Van Nuys bill without enthusiasm and "as a lesser evil."[5] As a result, the Committee filed no report on the bill. Later, however, on the Senate floor, the Borah-Van Nuys bill was added to the Robinson bill by amendment, and both bills went to the Conference Committee along with the House-enacted Patman bill. Unable to compose the differences of competing factions, the Committee failed to choose between the overlapping measures and finally resolved a stalemate by adopting both the Patman and the Borah-Van Nuys bills, as Sections 1 and 3, respectively, of the final ver-

4. The legislative history is described in ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-23, 453-59 (Trade Reg. Series, Little, Brown and Co., 1962) and PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 220-34 (Harvard Univ. Press, 1955) (Harvard Political Studies, published under the direction of the Department of Government in Harvard University).

5. ROWE, *op. cit. supra* note 4, at 455.

sion of the Robinson-Patman Act.[6] It is well known that the bills were not intended to be complementary and that passage of both bills was not the original desire of the sponsors of either.

In its report, which is the only committee report to mention Section 3 at all, the Conference Committee devoted only one paragraph to Section 3 as a whole, and the "unreasonably low prices" clause was not even mentioned. That paragraph (set forth in full in the note below) indicated that the function of the section generally was merely to add criminal penalties to substantially the same violations as those already covered in Section 1.[7]

6. PALAMOUNTAIN, *op. cit. supra* note 4, at 228.

7. The entire statement on Section 3 (the Borah-Van Nuys bill) in the Conference Committee report was as follows:

"SECTION 3

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and, except for the paragraph relating to cooperatives, separately treated in section 4 below, appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in section 1. Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibitions as to the particular offenses therein described and attaches to them also the criminal penalties therein provided.

"Section 3 also makes it possible for the person subjected to a discrimination prohibited therein to cause the offender to be prosecuted in the Federal court of the district in which such violation is committed." (H.R. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936)).

Not only was the "unreasonably low prices" clause not mentioned in any committee report, but nowhere in the debates in either House was there any explanation of it by any sponsor. In fact we have found no express reference to the clause at all by anyone in the Senate.[8] In the House, only

8. In none of the Government's citations to the debates (G.B.R. 16) is there any discussion of the "unreasonably low prices" clause, and some of the statements made actually negate any intention to interfere with price reductions: Senator Logan, who was floor manager for the Robinson bill (at 80 CONG. REC. 3112, 3113 (1936)), was discussing only the Robinson bill; the Borah-Van Nuys bill had not yet even been introduced. Later (at 80 CONG. REC. 6332 (1936)), Senator Logan again was not discussing the "unreasonably low prices" clause, but was arguing that the Robinson-Patman bill was needed to strengthen the original Section 2 of the Clayton Act, which contained a broad privilege of discriminatory price cutting to meet competition. Congressman Utterback (at 80 CONG. REC. 9416 (1936)) did not mention the "unreasonably low prices" clause, and his remarks concerning price cutting all dealt expressly with the problem of price discrimination.

Senator Borah himself never seems to have referred expressly to the "unreasonably low prices" clause. Although (at 80 CONG. REC. 6346 (1936)) he spoke of the injurious effects of secret allowances and area price cutting, he advocated only control of discrimination, and disavowed attempting to control prices as such. He stated: "the amendment which will be proposed [the Borah-Van Nuys bill] does not undertake to control the question of prices, to fix prices, or to regulate prices. It seeks only to enforce equitable action as to all customers who may be dealing with the party selling the goods."

Senator Logan also contended that nothing in the Robinson bill would interfere with selling at any price desired by the seller, to which Senator Borah added that this is the "fundamental principle of both bills"—to "compel all customers to be treated alike . . ." (80 CONG. REC. 6333 (1936)). Borah stated further that there was nothing in the proposed legislation "which justifies the argument that the bill prevents price reduction" (80 CONG. REC. 6334 (1936)).

two express references to it have been found. One was by Congressman Patman, who strongly opposed the Borah-Van Nuys bill at the outset. He pointed out that "evidently it was very hastily drawn," and called it "very indefinite as to what is an unreasonably low price" (80 *Cong. Rec.* 8227-28 (1936)). The other reference to it was by Congressman Celler, who at one point stated a preference for the Borah-Van Nuys bill, giving the "unreasonably low prices" clause as one reason (*id.* at 8228), but later opposed the entire legislation. In his final remarks, he stated that the law as enacted contained "much of uncertainty," and "many inconsistencies," and that "the courts will have the devil's own job to unravel the tangle." He added: "You have the herculean task to make it yield sense." (80 *Cong. Rec.* 9419 (1936).)

In its attempt to convert the clause into one aimed at "sales below cost", the Government suggests that there is some support in the history for such a theory (G.B.R. 16, 17). On the contrary, however, there is no indication that Congress believed that it was enacting any kind of "sales below cost" prohibition. First, it seems obvious that if "selling below cost" had been the main evil which it intended to remedy, Congress would have used express words to that effect, as have over 30 state legislatures which have acted on this problem (see *infra*, pp. 45-48).

Further, the Senate hearings claimed by the Government to indicate some intention to legislate on selling below cost (G.B.R. 17) actually do not support the inferences drawn at all. Senator Borah, who seems never to have referred expressly to the "unreasonably low prices" clause at any time on the record, did not say that the Borah-Van Nuys

bill was intended to stop "selling at less than cost." In context, he was not referring to selling below cost as such but to discriminatory price cuts.[9] As pointed out above, he denied on the Senate floor that his bill was intended to deal with price reductions as such (*supra*, p. 17 n.8). No Senator expressly referred to the clause in the hearings. No Senator or witness expressly singled out "below cost selling" as a pernicious evil in itself, apart from connection with discrimination, or with the so-called "loss leader" problem. The first two witnesses cited by the Government actually did not refer to the clause in issue.[10] The third (*Hearings* at 64)

9. The passage relied upon by the Government is one in which a witness was arguing in favor of the legality of discriminating in price as a business necessity, while prevention of this kind of discriminatory selling was said, by both Senator Logan and Senator Borah, to be the goal of the proposed legislation of 1936. When Senator Borah made the statement quoted by the government that the bill was intended "to stop that" (G.B.R. 18), he was replying to a statement by the witness who argued that small manufacturers should be allowed to sell at different prices to different customers. (*Hearings* at 53.)

10. At page 14 of the *Hearings*, Senator Logan, seeking support for the Robinson bill's elimination of the old Section 2's meeting competition defense, asked whether chain store use of "loss leader" selling was objectionable, and the witness, a member of the Harvard Business School faculty, answered that the use of "loss leaders" was not confined to chain stores, but was used by other retailers too, a circumstance to which he did not object. The testimony at page 17 consisted of a similar question by Senator Logan to another witness as to whether selling below cost should be permitted to meet competition, with the pointed reply, manifesting no belief in any need for legislation, that one who sells below cost for very long "will undoubtedly go bankrupt."

did not mention sales below cost and, while he suggested that he would favor some provision such as the "unreasonably low prices" clause, he strongly disapproved of one providing criminal penalties.

The other witness cited, and the only one quoted by the Government (G.B.R. 17 n.3), was an attorney who in context was really arguing a constitutional point—that Congress had power to legislate on the "loss leader" problem under the commerce clause, despite the fact that the problem is one of retail pricing (*Hearings* at 85-86). His testimony elicited no comment from the Senators present. Further, such scattered references in the legislative history to "loss leaders" have no relevance because it is clear that Congress did not attempt to legislate on this problem through the Robinson-Patman Act and, in any event, the "loss leader" is a completely different phenomenon from that complained of in the Government brief.[11]

It would be strange indeed if the Government were to imply any resemblance between "loss leaders" and "predatory sales below cost." The Department of Justice obviously does not regard "loss leaders" as an antitrust evil, for it

11. The practice of "loss leader" selling was defined by Congressman Celler in 1936 as the practice used by retailers of selling heavily advertised brands at a loss in order to induce customers to enter their establishments (80 CONG. REC. 8229 (1936)). On the Senate floor, Senator Logan explicitly stated that the legislation which became the Robinson-Patman Act "cannot" deal with that problem (80 CONG. REC. 6286-87 (1936)). Senator Borah evidently agreed. The next year, Congress did deal with that problem by enacting the Miller-Tydings amendment to the Sherman Act, exempting resale price maintenance under certain conditions (26 Stat. 209 (1937)).

vigorously opposes both private and legislative attempts to prevent their use.[12]

The Government's other historical arguments are equally unilluminating as to the "unreasonably low prices" clause. No doubt so-called "predatory pricing" has figured occasionally in antitrust cases and writings. As the Government brief itself shows (G.B.R. 13-16), however, there are two clearly applicable federal antitrust provisions, the Sherman Act and Section 2 of the Clayton Act, which can successfully deal with anti-competitive price-cutting, and the brief neglects to mention a third, Section 5 of the Federal Trade Commission Act. These statutes can apply to such price-cutting when it is accompanied by a combination in restraint of trade or by a danger of monopolization (Sections 1 and 2 of the Sherman Act), or by discrimination (Section 2 of the Clayton Act), or by injurious effect on competition (Section 5 of the Federal Trade Commission Act), all with objective legal standards which have a reasonably well-established meaning. The availability of all these laws in 1936 is strong evidence that the "unreasonably low

12. The Department of Justice and the Federal Trade Commission historically have opposed "Fair Trade" legislation designed to prevent "loss leader" sales through legalized resale price maintenance. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 153 (1955). The Government has also prosecuted under the Sherman Act sellers who undertake to prevent "loss leader" sales by activities outside the ambit of Fair Trade exemptions. United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956). The Court itself has been alert to condemn the use of court process to enjoin such selling in the absence of a clear exemption. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The Government obviously does not regard "loss leader" selling as unreasonable.

prices" clause was not designed to deal with any clearly-perceived problem of selling below cost.

The Government's intimation, as an excuse for the statute's vagueness, that Congress could not have used more definite language to deal with the supposed evil (G.B.R. 37-38), is thus hollow indeed. If three existing antitrust statutes were thought insufficient, there were other alternatives available to Congress in 1936 to deal with any supposed pricing problem. Congress might have employed the approach adopted by many state legislatures which have enacted "Unfair Practices Acts," using much more specific pricing standards and utilizing statutory definitions to supply guidance (see discussion *infra*, pp. 45-48). When Congress has sought to provide control of prices for regulated industries, it has endowed administrative agencies with the power to designate specific rates and prices with the utmost clarity. With respect to unregulated businesses, after the Lever Act of World War I, which was unconstitutional because it adopted the same approach as the provision in question (see discussion *infra*, pp. 55-58), Congress in World War II designated an administrative agency to administer prices. It is not suggested that in 1936 Congress actually believed there was any need for such measures since, as pointed out above, there is no reliable basis for ascertaining what Congress really intended. But if a reasonably clear and definite basis for the control of low prices was desired, constitutional means were at hand. They were certainly not utilized in the "unreasonably low prices" clause.

What history teaches is that Congress gave no real consideration to the borrowed words of the "unreasonably low prices" clause and allowed it to slip into the statutes unaccompanied by any explanation of its enigmatic phraseology.

C. The Vagueness of the "Unreasonably Low Prices Clause" Is Increased by Its Incongruity With the Other Provisions of the Robinson-Patman Act and With Antitrust Policy.

The clause in issue, unexplained by its history, becomes incongruous when it is placed in the context of the Robinson-Patman Act and of antitrust policy as a whole. This incongruity makes it all the more unfathomable.

The clause is confusing when related to the remainder of Section 3 of the Robinson-Patman Act, of which it is a part (see Appendix to this brief). The whole section bears the heading of "discrimination," and the first two of its three clauses both deal with discrimination, the first clause relating to discrimination between competing purchasers, and the second to geographical price discrimination. The natural expectation created by this context is that the third clause also would deal with discrimination, an impression made stronger by the fact that all of the clauses constitute a single sentence, separated only by semicolons, and that all have a single subject, grammatically speaking.

The indictment itself reflects the uncertainty of the grand jury as to whether some kind of discrimination is required. Each Robinson-Patman Act count contains a paragraph alleging that National "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war . . ." (*e.g.*, R. 9). This language is indicative of a geographical price discrimination theory—*i.e.*, that defendants "subsidized" low prices in one market by charging higher prices elsewhere. This aspect of the charge is thus a confusingly vague version of the second clause of the act, but without ever directly charging the defendants with discrimination.

The Government brief continually confuses the "unreasonably low prices" provision with the subject of price discrimination. The brief contends that in passing the original Section 2 of the Clayton Act in 1914 Congress intended to legislate on "unreasonably low prices" (G.B.R. 14). But the original Section 2 dealt solely with *discrimination* in prices, and the House Report which is quoted in the brief shows this on its face (*ibid.*).

The cases cited by the Government do not illustrate past recognition of problems of "unreasonably low prices" apart from discrimination or other independent antitrust violations. *Porto Rican Am. Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 237 (2d Cir. 1929) cited at G.B.R. 13), plainly was not a mere low price case. It was brought under the original price discrimination provisions of Section 2 of the Clayton Act and is a classic case of geographical discrimination of the kind which may be dealt with in the second clause of Section 3, not the third clause. Also, both *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), and *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954) (cited at G.B.R. 15), arising under the amended Section 2, rested directly upon allegations of area discrimination through selling at prices which were lower in one market than those charged in other markets. The other cases cited by the Government were Sherman Act cases involving charges of conspiracy or monopolization and are even less relevant here.[13]

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13. United States v. American Tobacco Co., 221 U.S. 106, 160-61 (1911); American Tobacco Co. v. United States, 328 U.S. 781, 807 (1946); United States v. Corn Products Refining Co., 234 Fed. 964 (S.D.N.Y. 1916).

Similarly, the legislative history of the Robinson-Patman Act of 1936 shows, as pointed out above, that what concerned Congress was the problem of discrimination. The Government argument that Congress had in mind grave dangers of predatory low pricing by large firms, apart from recoupment of losses through higher prices charged to other customers, is purely gratuitous (G.B.R. 16). If this were important to Congress, it is odd indeed that Congress did not incorporate an "unreasonably low prices" clause in the civil provisions of the act.

Vexatious problems of meaning arise in comparing Section 3's criminal prohibitions with the civil prohibitions of Section 2 of the Clayton Act, as amended (see Appendix to this brief). The "unreasonably low prices" clause has no parallel in Section 2. Further, the prohibitions of Section 2(a) against discrimination in price are expressly qualified by the requirement that adverse effect on competition must be shown. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). And three important substantive defenses to price discrimination are expressly provided by the statute: (1) cost justification; (2) changing market conditions; and (3) good faith meeting of a competitor's equally low price. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

In contrast, Section 3 makes no provision either for a test of effect on competition or for any of the substantive defenses. This situation is the exact opposite of what would reasonably be expected. Criminal prohibitions customarily are differentiated from civil prohibitions by requiring more, not less, culpable conduct than is required for civil offenses and by providing for more, not less, opportunity to defend.

No doubt this anomolous departure was due to the fact that Section 3 was tacked on to the civil provisions at the last moment without any reconciliation of their substantive differences. The result, in the words of a student of the history of the Robinson-Patman Act, was a "melange of partially incongruous and often vague provisions."[14]

All attempts to reconcile the confusing inconsistencies of these two sections are confronted with the severe problem described by Congressman Celler when the House Conference Report was being discussed in 1936. He stated (80 *Cong. Rec.* 9419 (1936)):

> "In an endeavor to get some sort of an agreement, the so-called Borah-Van Nuys provisions of the Senate bill were grafted onto the House bill, and we have what might be termed in common parlance somewhat of a 'hodgepodge'. . . . When you try to read them both together you have the greatest difficulty. You have the herculean task to make it yield sense."

Finally, grave doubts concerning the meaning of the "unreasonably low prices" clause are greatly deepened when the clause is set down in the broad context of the antitrust policy governing price competition. As pointed out later, the Court has repeatedly refused to substitute the judgment of the courts for that of the market as to the reasonableness of prices. This is because ever since 1890 the Court has adhered to the proposition that the "heart of our national economic policy" is "faith in the value of competition" (*Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)), and that competition in price is so vital a form of competition

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14. Palamountain, The Politics of Distribution 228 (Harvard Univ. Press, 1955).

that it is protected from restraints upon it by the rule of "per se" unreasonableness. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

While government may of course impose restraints upon competition which would not be tolerated if privately imposed (*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)), private citizens have been taught that vigorous low-price competition is one of our highest economic values. Antitrust policy thus teaches businessmen to believe that the "unreasonably low prices" clause does not mean, as the Government here says it does, that one who competes vigorously by a policy of low prices thereby treads at all times on the borderline of criminal illegality.

When seen in this context, the requirement that an intent to destroy competition, in which the Government brief continually seeks some solution for all of the statute's problems of vagueness inherent in the clause, far from contributing clarity, adds to the difficulty. The intent made suspect differs so little from normal competitive objectives that it may be nearly impossible to differentiate, as the Government has itself pointed out (G.B.R. 18). Businessmen who are fully advised of the consequences of the Government's theory of prima facie violation may well conclude that to be sure of complying with the statute they should reject the ordinary economic objective of price competition. Safety may well seem to lie only in keeping prices at the same level as, or higher than, those of competitors. Even this may not prevent accusation. As this case demonstrates, indictment may follow merely from meeting a competitor's price (R. 37-38).

It is most unlikely that Congress intended any such consequences to flow from this law, and this makes it all the more apparent that what Congress did intend is unascertainable.

D. The Government's Proposed Meanings for the "Unreasonably Low Prices" Clause Have No Support in the Language, History or Context of the Statute and, Even if Adopted, Would Be Too Indefinite.

The vagueness of the language and the lack of any illuminating history have caused the Government to place its main reliance in this appeal upon an attempt to induce the Court to construe the provision in issue to accord with meanings which the Government has itself created out of whole cloth. The tests offered are said to be derived from the "context" of the statute and from the customs and standards of the business community, not from the language of the statute. In its first brief on this appeal, the Government made no effort to defend a general meaning for the "unreasonably low prices" phrase, as such, but confined itself to contending that sales "below cost" are "unreasonably low." The revised brief, at the outset at least, attempts a broader exegesis.

The meaning of the prohibition in issue is characterized broadly by the Government as (G.B.R. 11):

> "sales made with predatory intent at prices so low as to lack a rational foundation in the seller's costs, market conditions, business prospects or exigencies, or other circumstances facing the seller of a kind that an ordinary businessman in the seller's position, but without predatory intent, would take into consideration."

This complex formulation is repeated with variations many times throughout the brief. Bearing no visible resemblance to anything in the statute, it is said to be "compendiously summarized" by the language of Section 3 (G.B.R. 21).

Perhaps recognizing that this sweeping substitution for the words of the statute may not be acceptable, the brief offers the narrower but equally original alternative that (G.B.R. 12):

> "A price below the seller's own costs is unreasonably low, by any normal business standard, in the absence of some extraordinary, identifiable explanation."

Obviously, however, not all prices below cost can be called "unreasonably low prices." As the Government admits (G.B.R. 41-42), there are an abundance of "below cost" situations which Congress could not possibly have meant to treat as "unreasonable," and the statute must distinguish these situations. The statute as actually enacted, however, provides no distinction between good and bad sales below cost because it does not mention sales below cost at all. This gap is sought to be bridged by the expedient of shifting to the defendant the burden of trying to fill in the meaning, requiring him to supply a definiteness which the Government cannot supply. Sales below cost are *presumed* by the Government to be illegal, unless justified by the defendant. The Government's brief states (G.B.R. 10; see also *id.* at 40):

> "*Prima facie* such prices are unreasonably low from the seller's own point of view. No businessman would accept them, absent an intent to destroy competition, unless some specific justification were demonstrated . . . .

> A jury is quite capable of ascertaining by reference to commercial practice whether a defendant's explanation sets forth a rational business reason."

Thus, in the Government's view all it would need to prove to establish a crime would be that the seller sold below his own costs. To the Government, a seller who does this must have either a predatory intent, or a good business reason; it will be up to him to try to prove that it was the latter.

These proposed constructions are not warranted by the language of the statute or by its context. Further, they would not, if adopted, make the statute sufficiently definite.

1. The Government's General "Rational Businessman" Test Is As Indefinite As the Language of the Statute.

The abstract formulation, quoted *supra*, p. 28, with which the Government seeks to fill in the vast blank spaces in the statute's meaning adds nothing to the definiteness of the statute for three reasons;

First, while obscured in verbiage, the "rational businessman" formula literally adds nothing to what the statute says. The formula says that selling at unreasonably low prices with predatory intent means selling at prices which are lower than an ordinary businessman would rationally charge, coupled with predatory intent. It does not delimit what is "reasonable," or what is "rational," in any way. On the contrary, by including as relevant the "seller's costs, market conditions, business prospects or exigencies, or other circumstances facing the seller" (G.B.R. 11), it goes out of its way to hold the door wide for almost every conceivable kind of argument and counter-argument on the subject.

The brief claims that a seller required to follow this formula to avoid committing a crime can "readily identify" the factors to take into account in determining whether his price is too low. The possible factors for him to keep in mind, it states, are: "the seller's costs, both direct and indirect, the opportunity to reduce unit costs by increasing volume, the quality and condition of his goods, the market price or the prices of his competition, the ratio of profit to both gross sales and invested capital, an urgent need to liquidate inventory, *and a host of similar considerations*" (G.B.R. 30-31; emphasis added). These relevant factors of reasonableness, it is said, will vary in relative importance from industry to industry and case to case, but a "rational businessman" will "feel no uncertainty about how to guide his conduct" (G.B.R. 31). The mere quotation of this unlimited array of "relevant factors" demonstrates, however, that the formula does not reduce the vagueness of the statute in one degree.

Second, the formula's "rational businessman" test is a test of what an "ordinary businessman" would "rationally" do in the defendant's position. This would require judging the reasonableness of the prices of one seller by a standard of what the seller's "rational" competitors would have done. Competitors might even be asked to give evidence for the prosecution on what a "rational businessman" would have charged in the defendant's position. Who else would be qualified to testify on this issue? Such an approach is so incongruous in the context of a competitive economy that its very statement by the Government tends to increase rather than reduce the statute's ambiguity.

There are many instances in which rules of law function

well by holding individuals to standards of conduct set by their peers, as for example in the law of torts. But legally required conformity to the pricing standards set by a seller's competitive peers is a concept which is utterly foreign to the antitrust policy of price competition. The prices of a businessman who undersells his competitors are almost always "unreasonably low" in their eyes. The Government has said elsewhere that it does not mean to construe this law as one designed to curtail price competition and secure a reasonable profit for everyone (G.B.R. 19). But its basic position on interpretation of the statute belies its disclaimer. Its position is that failure to charge a price which will yield a profit (*i.e.*, a sale below cost) is prima facie illegal, and that a jury should judge the reasonableness of the defendant's conduct in terms of what the average businessman would think about the defendant's prices. No approach could be more calculated to induce confusion as to the meaning of this clause in the minds of vigorous competitive-minded businessmen.

Third, the Government expressly regards its sales below cost theory, discussed next, as a more definite formulation than this overall "rational businessman" test. In fact, statements made toward the end of the Government brief eliminate the possibility of bringing sales *above* cost within the statute. The Government gives the flat assurance that all a businessman has to do to be sure of compliance is to "sell above cost, a normal business objective" (G.B.R. 40). It adds: "[I]f the sales are yielding a profit, according to the seller's *bona fide* method of accounting, no inference of unreasonable pricing could be drawn merely from proof that, according to another method of accounting, he

is selling at a loss." (G.B.R. 41). These remarks yield no other interpretation than that the Government concedes that sales above cost are, as a matter of law, not at "unreasonably low prices." The very broad formula constructed by it at the outset of the brief therefore seems to have no real role to perform at all. Accordingly, we turn for a more extensive treatment to the theory of "sales below cost" upon which the Government places its real reliance.

2. A Prima Facie Presumption That Sales Below Cost Are Unreasonable Is Unsupportable.

If Congress had intended to make sales below cost prima facie illegal as contended by the Government, the question arises at once as to why it did not use such language. Especially is this so in light of the fact that the Government has found it possible to state this idea repeatedly. Congress should not be assumed to have intended a thing so radically different from the language it actually used, when it could easily have used more appropriate words had it so desired.

It is clear that Congress did not use such language as the Government uses because the ideas involved would be offensive to logic, to basic traditions of American criminal legislation, and to generally accepted facts concerning the nature of selling below cost. The concept advanced by the Government would create a presumption of criminal guilt as to conduct, *i.e.*, selling below cost, which on the Government's own admission, may be innocent rather than wrongful (G.B.R. 41-42). Such a presumption, especially one rising to the level of a prima facie case, thus rests on a false premise and the Government's legal conclusions are unsound.

Moreover, this presumption would place upon defend-

ants, through the device of shifting the burden of proof, the responsibility for defining the crime initially, a responsibility which rests upon the legislature itself. It would transfer to the jury, under the guise of its passing on the issue of justification, the ultimate decision as to what the law governing these sales should be. The presumption would be offensive to the fundamental principle of the presumed innocence of persons charged with crime, by which the whole system of American criminal law has been made compatible with a free society. It is not necessary to consider here whether Congress could constitutionally enact such a statute—it is enough to point out the substantial reasons for concluding that it is extremely unlikely that it intended to do so in this instance.

It is important to note how far the Government goes in contending that sales below cost are prima facie unreasonable. The brief advances over and over the proposition that sales below cost are by nature indicative of unreasonable behavior and of unlawful intent. It states that such sales can be justified only in "extraordinary circumstances" (G.B.R. 42) and that (G.B.R. 38):

> "Selling below cost, in the absence of special circumstances, is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect . . . ."

While admitting "special situations" where such sales would be legitimate (G.B.R. 41-42), it states that "selling at a loss . . . constitutes selling at unreasonably low prices" in the absence of "abnormal business circumstances" (G.B.R. 40).

This attempt to construe the statute to make "sale below

cost" amount almost to "sale at an unreasonably low price" is based upon a totally unrealistic view of pricing in the modern economy. Selling below cost is by itself a neutral occurrence and is an every day happening in most businesses for a variety of normal reasons. This is obvious from the Government's own list of so-called "special situations": (1) disposing of excess inventory; (2) selling obsolete or spoiling merchandise; (3) closing out a line which the seller wishes to discontinue; (4) introducing a new product or breaking into a new market; (5) meeting competition in good faith; (6) reducing prices to increase profits by increasing volume; and (7) pricing by-products or minor lines at less than "fully distributed" cost (G.B.R. 41-42).

Plainly these examples are not "special situations," but are normal and frequent business events. Business concerns of all types are constantly faced with the problem of disposing of excess or obsolete goods. Further, sellers introducing new products in our fast-changing economy are often required to absorb losses for substantial periods of time while the products become established in the market. And it is difficult to conceive of any sale below cost which would not come within the Government's sixth example, *i.e.*, made with the hope of increasing volume and thereby improving the seller's profit situation.

Even so, the Government's list is far from complete. It should certainly also include at least the following: (8) sales which prove to be below cost because the seller has overestimated the volume he would sell at the announced price; (9) sales which are below cost because costs unexpectedly increase during the selling period; (10) sales which are below cost because the seller is less efficient than competitors,

and is losing out in the competitive struggle; (11) sales which are below cost because of inefficiency, but which are made in order to stay in the market while more efficient methods are introduced; (12) sales of items which are carried for the convenience of customers whose main patronage is as to other products; (13) sales made to stimulate business, such as two-for-one promotions and "one-cent" sales, and sales of one product at a low price for the purpose of advertising the seller's whole business; and (14) the very frequent situation of sales which are below cost simply because the seller does not know what his individual unit costs are.

It is thus obvious that there are countless situations in which selling below cost cannot be regarded as improper conduct.[15] In 1961, 17,075 industrial and commercial business concerns failed (U.S. Dep't of Commerce, *Statistical Abstract of the United States* 506 (1962)). In the same year, over 5,000 bankruptcy cases were filed in the District Courts involving bankrupt merchants and manufacturers (*id.* at 507). Many, if not most, of these failing enterprises undoubtedly were forced to make substantial sales at unprofitable prices. The Government argument overlooks the fact that by far the most frequent result of selling below

15. We know of no case holding that selling below cost is equivalent to selling at unreasonably low prices. Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir. 1957), cited by the Government (G.B.R. 38), did not equate selling below cost and unreasonably low prices, nor did it define either term. It said only that "consistently" selling at a loss "without competitive compulsion" (*id.* at 486) could not be defended as not selling at unreasonably low prices. The court concluded that no violation was shown because of lack of illegal purpose.

cost for a substantial period is not destruction of competition, as it claims, but failure of the unfortunate concern which for any reason must make such sales.

It is submitted that the presumption concerning sales below cost should be the opposite of that argued by the Government. It is far more accurate to say that sales which are actually at less than cost are usually for innocent reasons and are only contrary to antitrust policy in "extraordinary" situations.

The Government indulges in a mere play on words when it says that since businesses are designed to make a profit, selling below cost is "unreasonably low" in a business sense (G.B.R. 42). Perhaps top company officials would look askance at a regional manager who did not understand that selling at a loss is usually undesirable. But this teaches nothing about Congressional intent on this subject (G.B.R. 24). Surely the Government does not mean that Congress has made it a crime to fail to make a profit, to be inefficient, to be ignorant, to become a business failure, or to alarm top company officials. Yet this is the logic of the particular Government argument.

Obviously, what an "unreasonable" price is must be determined from the law. The only real test offered by the Government to determine when a low price, including a sale below cost, is "unreasonable" is to determine whether the price is coupled with "predatory intent." The brief frankly states that, "indeed, the seller's predatory intent is the very core of the illegality" (G.B.R. 39) and "the heart of the violation" (G.B.R. 43). Summarizing its position on this issue, the Government says flatly: ". . . if they sell below cost for the purpose of destroying competition, they are committing a criminal offense" (G.B.R. 42). In other

words, selling below cost is unreasonable only if accompanied by predatory intent.

The Government position plainly rests upon the fallacy of using the intent phrase of the statute to satisfy the requirement of showing the price to be "unreasonably low," contrary to its own analysis that these are separate elements to be separately proved (G.B.R. 20). Proof of predatory intent under this approach would thus be used twice. First, it would be used to demonstrate that a low price was unreasonable. It would then be used again to satisfy the intent requirement of the clause. This would read the "unreasonably low prices" test out of the statute. As the Government points out, Congress did not place sole reliance upon intent as a device for separating desirable competitive price cuts from undesirable reductions because it is so difficult to discern the difference. The Government would not only have the Court do what it says Congress meant to avoid, but it says further that proof of illegal intent could be almost automatic; it has stated that if a firm selling at low prices knows that the result will be to injure its competitors, "it could hardly deny an allegation of [illegal] purpose" (G.B.R. 18).

The startling and, we submit, wholly unacceptable implication of the Government theory may best be seen by summarizing it. Under this theory, proof of sales below cost will create a prima facie case of unreasonableness: the Government states that "selling at a loss . . . constitutes selling at 'unreasonably low prices' unless there are abnormal circumstances which justify the losing operations" (G.B.R. 40). Proof of selling below cost also will create a prima facie case of illegal purpose: the Gov-

ernment says that "selling below cost, in the absence of special circumstances, is explicable only as part of a campaign to destroy competition . . ." (G.B.R. 38). "Selling below cost" alone therefore is offered as a sufficient basis for conviction. Apart from defending on the issue of whether the sales actually were below cost, the only defense would be some kind of justification. No one can know what justification will be held sufficient until it has been tried and a judge and jury have ruled. The statute is silent, and the Government does not commit itself. The most critical questions concerning the statute's meaning are thus left unanswered.

The parties are in agreement that the phrase, "unreasonably low prices," must be given a meaning which is independent of the illegal intent phrase. The Government has clearly failed to accomplish this in its effort to make selling below cost ipso facto "unreasonable."

3. Even if "Selling Below Cost" Were Treated as an Equivalent of "Unreasonably Low Prices," the Statute Would Be Unconstitutionally Vague Because of Lack of Any Definite Rules for Interpreting and Applying It on a "Cost" Basis.

Assuming with the Government that all one need do to comply with the law is to "sell above cost" (G.B.R. 40), this statute still would not provide the seller with the guidance as to the cost standards involved necessary to satisfy the constitutional requirements of definiteness. As an abstract concept, "cost" may be readily understood. But unless it is carefully defined, "cost" is not a sufficiently definite standard to serve as a dividing line between legal and criminal conduct.

In order to comply with and safely follow a cost standard in determining his prices, a seller must know: (1) whose cost is relevant, *i.e.*, his own cost, the cost of one or more competitors, or average costs; (2) what kinds of costs must be taken into account and over what period of time they are to be determined; (3) how to segregate joint costs among individual products manufactured by the seller and how to allocate indirect costs; and (4) how to determine these things in advance of announcing his price. The Government calls Section 3 a "living directive addressed to the business community" that if firms sell below cost to destroy competition they commit a crime (G.B.R. 42). If so, this "directive" should provide answers to these questions. Obviously, however, it supplies none whatever. The basic position of the Government seems to be that most of these questions do not need to be answered. It says that to ask whether "selling below cost" is a vague and indefinite standard "misses the point entirely" (G.B.R. 40), and the Government belittles the whole question of what is meant by "cost" and how it is to be determined. Evidently it would resolve these ambiguities by enveloping them in an amorphous question of "reasonableness" to be delegated to a jury (G.B.R. 41).

This approach flouts the definiteness requirement of the Constitution and asks the Court to adopt a view of cost which completely ignores all experience and responsible teaching on the subject.

a. *Whose Cost Is Relevant?*

The Government assumes, as if it were too obvious to require discussion, that it is the seller's own costs which govern (G.B.R. 40). There is no basis whatever for this

proposition either in the statute or in anything to which the defendants in this case could have looked for guidance prior to the Government's argument on appeal.

While it might seem at first glance that the seller's own cost should be determinative, this assumption becomes doubtful when it is examined. Usually the costs of different firms in an industry are different. Suppose that a seller's costs appear to be higher than those of competitors. May he safely go below his own cost in the course of competition? It would seem that he should be allowed to do so. But the statute is silent. The Government volunteers that "meeting in good faith the equally low price of a competitor" *might* justify selling below cost "to retain a customer" (G.B.R. 42), but may a seller rely upon that in the face of the Government's basic argument that selling below one's own cost is prima facie illegal? Moreover, what kind of "meeting competition" below cost will be permitted does not appear, except that the Government's choice of words imports a narrow scope for the defense. The vexatious controversies over the meaning of the defense in civil cases under Section 2 of the Clayton Act are well known to the Court. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *FTC v. Standard Oil Co.*, 355 U.S. 396 (1958).

Conversely, suppose that the defendant's costs are lower than those of his competitors, and that he persistently sells at prices which are consistently below their costs but which are profitable to him. Will he be safe in assuming that the Government will not prosecute him if competitors are injured, either by contending that his own costs are not in this instance a decisive standard or by attacking the bona fides

of his accounting system under a law which is standardless on that subject?

b. *What Costs Are Relevant?*

Even if it were clear whose cost will govern, it would still be unclear what types of costs are to be included and over what period of time they are to be calculated. Here again the statute supplies no guidance. Will "direct" costs suffice, or must all costs be "fully distributed" to each unit sold? The most easily ascertained cost, especially for retailers, would be the direct cost of goods sold. Retailers, with stores handling hundreds or thousands of different items, might reasonably believe that "sale below cost" would mean sale below the invoice cost of the merchandise. Such retailers obviously seldom know, or can take time to consider, their other costs when pricing a single item in a store-full of items. Also, processors such as dairy concerns might believe that they were not selling below cost for purposes of such a statute as this if they sold one of their products above the cost of the major raw material used. These uncertainties as to what would constitute below-cost sales are greatly increased by the fact that, in deciding whether to make a given sale, a businessman naturally will reflect the familiar maxim of economics that operations are not unprofitable if they produce revenue which covers marginal cost.

But in any contested case, prosecutors may contend that "cost" must include total actual costs, and not only all direct costs but also a proper allocation of the indirect costs of doing business. The Government here evidently would argue that all "direct and indirect" costs must be included (G.B.R. 30). Although this subject is enormously complicated by

many variable factors which can greatly alter the result, the statute provides no guidance.

The extreme difficulty of identifying and defining relevant costs was emphasized by a Department of Justice letter to the House Interstate and Foreign Commerce Committee in 1960, opposing H.R. 10235 in the 86th Congress, Second Session. That bill, introduced by Congressman Patman after the *Nashville Milk* case in an effort to meet the Court's objections to the vagueness of the "unreasonably low prices" clause, undertook to provide some definitions. It defined "unreasonably low prices" as including a sale "at a price below cost, as such term is defined by the law" of an applicable state sales-below-cost statute (*Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 6 (1960)). In the absence of a state law, the bill provided the following definitions for sales below cost (*id.* at 2):

> "(1) in the case of a producer, a sale at a price less than the cost of manufacturing, packaging, and selling a commodity together with the payment of such transportation costs as are actually borne by a producer; and (2) in the case of any other vendor, a sale at a price less than the invoice or replacement costs of the commodity plus the overhead cost and other costs of the vendor doing business."

Although these definitions made the bill far more certain than the present statute would be as construed by the Government, the Department of Justice letter nevertheless objected to them as "vague and uncertain." It criticized the references to state law in part on the ground that it would be difficult to determine which law would apply, the point

to the criticism being that the state law definitions of "cost" vary greatly. It criticized the definitions quoted above, as follows (*id.* at 7):

> "The definitions to be applicable in the absence of State law would also present problems, particularly with respect to the meaning of the word 'cost.' The cost of manufacturing, of packaging, of selling, not to mention overhead cost, *are all imprecise terms* as to the meaning of which there will no doubt be disagreement." (Emphasis added.)

The Department stated further that these bills would "carry over many of the ambiguities inherent in the present language of Section 3 of the Robinson-Patman Act and would add to them other difficulties and uncertainties . . ." (*ibid.*).

The Federal Trade Commission also opposed the bill for similar reasons. It found that the above-quoted definition was "too general and leaves unanswered many questions" (*id.* at 4). The Commission regards determination of cost as an extremely complicated matter and believes that even a civil provision prohibiting sales below cost which the Commission itself would administer should have a highly detailed definition of cost. It proposed to the House Committee, *supra*, a specific definition of cost, which is set forth in the footnote.[16] Comparison of this definition with the com-

16. ". . . the term 'cost' means the respective seller's cost and not an average cost in the industry whether such average cost be determined by an industry cost survey or some other method. It consists of the total outlay or expenditure by the seller in the acquisition, production, and distribution of the products involved, and comprises all elements of cost such as labor, material, depreciation, taxes (except taxes on net income and such other taxes as are not properly applicable to cost), and general overhead expenses, in-

pletely undefined concept of "cost" offered by the Government in this case highlights the glaring deficiencies in the proposed approach.

The experience of the states with detailed prohibitions of sales below cost also illuminates the problem of definiteness about the meaning of "cost." There are about 30 states having laws of general applicability imposing certain prohibitions upon sales below cost under defined and qualified circumstances, and others which have laws relating to specific commodities.[17] Practically all of these laws set forth definitions of "cost," detail the elements which must be included in the determination of cost, and provide some basis for determining cost. The Government's assertion that in this respect no definiteness is needed should be contrasted with a typical state provision such as the one set forth in the footnote.[18]

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curred by the seller in the acquisition, manufacture, processing, preparation for marketing, sale, and delivery of the products. Not to be included are dividends or interest on borrowed or invested capital, or nonoperating losses, such as fire losses and losses from the sale or exchange of capital assets. Operating cost should not be reduced by items of nonoperating income, such as income from investments, and gain on the sale of capital assets." *Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 4-5 (1960).

17. The state statutes are listed at 2 TRADE REG. REP. ¶ 6571, *et seq.*, and the full text of each statute is set forth in 4 TRADE REG. REP. beginning at p. 35,001.

18. The following definitions of "cost" found in the Arkansas statute are typical of the provisions of a number of the state laws:

> The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost"

Illustrative of the impossibility of understanding and applying a cost test of the type urged by the Government without a definition is the fact that the Arkansas definition quoted in the note expressly includes interest on borrowed capital and all types of taxes, while the Federal Trade Commission definition (*supra*, pp. 44-45 n.16) excludes interest and some, but not all, taxes. Virtually all of the state legislatures have recognized a need to clarify the "cost" concept. Nevertheless, the variation in the detailed provisions of the different state laws is itself eloquent evidence of the difficulty of deciding what "cost" is. Consequently, a majority of the statutes do not stop with definitions but go even further to reduce uncertainty by specifying an arbitrary percentage markup to be added to the cost of goods of wholesalers and retailers. This markup is a legislative determination of the defendant's "cost of doing business" to be used unless the defendant shows that his actual costs were lower. It is interesting to note that there is even great variation from state to state in these statutory percentages. Different statutes provide for 2%, 4%, 5%, 6%, 7%, 8% and even 12% (2 *Trade Reg. Rep.* ¶ 6709), showing basic disagreement as to what a reasonable allowance or average for costs of doing business should be.

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shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising. (ARK. STAT. tit. 70, ch. 3, § 70-303 (1947).)

Even with their detailed definitions, some of the state statutes have encountered constitutional difficulty on grounds of vagueness and uncertainty *id.* at ¶ 6629. No state statute which fails to define cost has been upheld against an attack for vagueness so far as we have been able to determine. The Supreme Court of Kansas recently invalidated, under the federal and state constitutions, provisions of a statute governing sales of milk which made it unlawful to sell milk "for less than cost to the wholesaler, processor or distributor at the point of delivery." *State v. Fleming Co.*, 184 Kan. 674, 339 P.2d 12 (1959). The remarks of the court are especially apt in view of the Government's assertion here that all the seller need do is to refer to his own books and rely on his own methods of accounting, if bona fide, to know whether he is above or below the undefined "cost" supposedly contemplated by the statute. The court declared the provision unconstitutionally vague partly because it contained no definition of cost, stating (184 Kan. at 681, 339 P.2d at 17):

> "It is argued that in this day and age, everyone in business has the services of accountants but it will be seen that the statute leaves unanswered the question of whether the cost is to be determined as of a particular shipment or based upon business for a week, a month, six months or a year. The statute is totally silent as to what expenses are to be included in arriving at the cost at the point of delivery."

There the state argued, as the Government does here, that the defendant would know his own costs and could therefore comply with the statute. The court did not accept this oversimplification (*ibid.*):

> "The appellant would read the statute to simply pro-

vide that the appellees should keep books in good faith. But we cannot feel that the interpretation of the statute is so simple."

c. *How Are the Relevant Costs To Be Determined and Allocated?*

There are still further serious difficulties with using "sale below cost" as a test of "unreasonably low prices." Even if there were complete agreement upon whose costs will govern and what costs should be included, there would remain the complex problems of computing the relevant costs and of allocating indirect and joint costs to particular sales of particular products. The complex and arbitrary choices necessarily inherent in such determinations, revealed by cost justification proceedings in civil cases under the cost proviso of Section 2(a) of the act (see Appendix to this brief) are notorious. These difficulties prompted the Court to advert to "the intricacies inherent in the attempt to show costs" in such proceedings and to the "elusiveness of cost data, which apparently cannot be obtained from ordinary business records . . ." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 68 (1953).

The cost justification proviso is far more definite than the undefined standard offered here. It names the costs which are relevant to a determination under Section 2(a) and, moreover, operates only after the respondent has committed a prima facie violation and is thus on notice of possible illegality. The proviso operates only in civil, and not in criminal, situations. Even so, it has proved to be extremely difficult to apply. In 1956, the Federal Trade Commission's Advisory Committee on Cost Justification confirmed these difficulties. The Committee directly contradicts the Gov-

ernment's contention here that it is a simple matter for defendants to produce the relevant cost information from their own records.[19] As the Committee stated: "It has not been customary for business enterprises to calculate and record the costs of commodities and distribution services in the detail required for a Robinson-Patman Act determination."[20] The Committee completely rejected any assumption that product costs can be readily determined in accordance with "scientific" cost accounting procedures:

> "Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the prescription of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact

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19. Few agencies have had more experience with the relation of costs to prices than the Office of Price Administration in World War II. In 1946, Congress was considering a proposal that prices fixed by OPA should provide for total costs plus a reasonable margin of profit. The Deputy Administrator for Accounting of OPA, Paul M. Green, reported to the Banking and Currency Committee of the House of Representatives that probably 85% of all industrial companies do not allocate cost information on a product basis and hence could not produce cost information needed to determine prices on a cost basis. Later, this estimate was more than confirmed by a survey of 187,370 companies. EDWARDS, PRICE DISCRIMINATION 592-93, n.18 (The Brookings Institution, 1959).

20. ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION 10 (1956); CCH, COST JUSTIFICATION REPORT, TEXT OF REPORT TO THE FEDERAL TRADE COMMISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION 14 (1956).

that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is not warranted. With few exceptions, every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation." (*Advisory Committee Report* at 6, *CCH* at 10, *op. cit. supra*, n. 20.)

These authoritative characterizations of the difficulties of determining the unit costs of particular products are confirmed by Prof. Corwin Edwards, former chief economist of the Federal Trade Commission. In his book on price discrimination,[21] he points out that individual sellers frequently market a number of commodities, and that when the cost of one of these products comes into question, it becomes necessary to segregate the costs applicable to that product from the costs applicable to the others. This is an extremely difficult thing to do. The problem would arise under the present indictment, which covers a number of different products expressly lumped together under the term "milk," including not only milk and cream in their various forms but also "by-products such as cottage cheese and sour cream" (R. 2).[22]

Moreover, as Prof. Edwards points out, the further

21. EDWARDS, PRICE DISCRIMINATION 591 (The Brookings Institution, 1959).

22. As Walton H. Hamilton said shortly after enactment of the Robinson-Patman Act: "No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork". Hamilton,

difficult problem arises of allocating responsibility for various costs of doing business to particular products. There are, he states, "often several plausible ways in which that responsibility can be determined, each differing from the other in the resulting computation of costs."[23] He discusses the inherent limitations on the ability of sellers to price their products in terms of cost because of uncertainties as to the volume which will be sold, the efficiencies which will be achieved by different production levels, and the other inherent obstacles to knowing one's costs in advance.

These demonstrations of the inherent difficulty of using cost as a standard for price in the relatively narrow and defined area of cost justification under Section 2(a) are all the more pertinent to the totally undefined standard of cost offered by the Government as an absolute test of the legality of prices. The difficulties are borne out by careful analysis of experience under the state sales-below-cost statutes.[24]

Cost as a Standard for Price, 4 LAW AND CONTEMP. PROB. 321, 328 (1937). Another well-recognized authority in the accounting field suggests four ordinary methods of accounting for by-products, of which yields a different result and three of which involve attributing no cost at all to the by-products. WIXON, ACCOUNTANT'S HANDBOOK 6-72 (Ronald, 4th ed. 1961). Acceptable methods of attributing costs to joint products include allocation of costs on the basis of (1) relative market *price*, (2) proportionate volume of common material, (3) a survey "whereby common costs are allocated to joint products *arbitrarily* after consideration of a number of important factors. . . ." (*Id.* at 6-70, -71, emphasis added.)

23. EDWARDS, *op. cit. supra* note 21, at 596-97.

24. Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105, 123 (1957); Lovell, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L.J. 391, 396 (1948).

The Government is thus grossly in error when it asserts that determining whether defendants have sold below cost will be a simple matter. The same error undermines the opinion in *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal. 1951) (quoted at G.B.R. 40), in which the district judge, whose authorization in the same case of private suits under Section 3[25] has since been invalidated by this Court's holding in the *Nashville Milk* case, voiced the erroneous impression that "cost accountancy has reached the exactness of a science" (98 F. Supp. at 189).

d. *Actual Costs Are Often Unascertainable in Advance of Sale, and Books Kept in the Ordinary Course of Business Do Not Provide the Cost Information Needed.*

Perhaps the most serious objection to the Government's undefined "sales below cost" proposal is the fact that sellers very frequently have no way of determining the unit costs of individual articles to be sold until sometime after the sale has occurred. A criminal prohibition making sales below cost presumptively illegal without providing the definitions and standards necessary to solve this problem lacks constitutional definiteness.

The Government states that the "overwhelming proportion" of the cases it will bring will be ones in which the seller's own books will be available as evidence (G.B.R. 41). It proposes to use the books as follows: "A seller who drops his prices, without a nonpredatory reason, to a level which is below cost according to his own records," it is said, will

25. Balia ..ce Cream Co. v. Arden Farms Co., 94 F. Supp. 796 (S.D. Cal. 1950).

be violating the law. If his accounting is "*bona fide*" and shows a profit, he is not violating the law. If he "reasonably thinks" he is not selling at a loss, "that is the end of the matter." (G.B.R. 41.)

This blithe reliance by the Government upon the seller's own books creates an illusion of definiteness that does not exist. It will solve no problems concerning definiteness insofar as sellers who must comply with the law are concerned. Nor will it solve them for the courts. First, sellers usually are not able to keep, in the ordinary course of business, cost records showing the actual unit costs of individual articles in the particularity necessary to compare them with unit prices for purposes of a rule such as is proposed. In the day to day conduct of business, sellers can not afford to attempt the intricate accounting which would be required. As the Court has pointed out, accurate data of this kind is extremely hard to obtain, and "apparently cannot be obtained from ordinary business records" but "only after detailed investigation of the business." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 68-69 (1953).

Moreover, even if such a "detailed investigation" could be obtained for each price, it would seldom be possible to do so before the sales are made because the actual costs per unit will depend upon the volume actually sold and the expenses actually incurred in producing and selling the units concerned. The Government's brief in fact admits that "unit costs" will vary with the volume sold (G.B.R. 30-31). Consequently, the *advance guidance* needed for compliance is lacking. It will be noted that the Government does not say that it will limit the cases it brings to ones in which the

seller's records showed the relevant costs prior to the sales under attack.

Further, the Government obviously will feel free to challenge the correctness of the seller's books if it distrusts them. It says that the question is what the seller "*reasonably thinks*" (G.B.R. 41, emphasis added), and this means whether his accounting is "*bona fide*" (*ibid.*). Likewise, the seller must be permitted to show, if he wishes, that his books are not reliable evidence on the particular issue. The Government's representation that "refined problems of cost accounting" can and will be ignored (G.B.R. 40) in favor of its grossly unrefined approach to the subject of costs is therefore erroneous.

Finally, a sales "below cost" standard for prices, without detailed regulations for its observance, is completely impracticable in the presence of competition. Persons who are buffeted by market price competition cannot confidently determine their prices in terms of cost. Only a seller enjoying the protection of monopoly, such as a public utility, is relatively free to determine price on the basis of cost. As has recently been pointed out: "[S]ellers exposed to market forces must quote prices responsive to the pressures of demand and competition . . . indeed, prices . . . may *determine* the unit cost of the output more than vice versa". Rowe, *Price Discrimination Under the Robinson-Patman Act*, 306 (1962). The Government's contrary suppositions are unsoundly premised and provide no basis for a constitutionally definite control of low prices under threat of criminal punishment.

II. THE DECISIONS OF THIS COURT DEMONSTRATE THAT A PROHIBITION OF "UNREASONABLY LOW PRICES" IS NOT SUFFICIENTLY DEFINITE TO SATISFY CONSTITUTIONAL REQUIREMENTS.

A. The Constitutional Invalidity of a Reasonableness Test for Price Is Established by a Long and Consistent Line of Constitutional and Antitrust Decisions of This Court.

Under the decisions of this Court the constitutional requirement is that "the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). In its revised brief (G.B.R. 48) the Government expressly agrees "that it is the adequacy of the statute which must be tested" and, as we have pointed out, now devotes considerable effort to an attempt to cloak the vague stricture on setting "unreasonably low prices" with sufficient meaning to meet this constitutional test.

The clause at issue makes reasonableness the basic criterion by which legal prices are to be distinguished from illegal ones. The Court, however, has often tested the constitutional adequacy of that criterion as a standard for demarcation of illegal prices in our competitive economy and has, as often, found it wanting. Whatever the constitutional status of tests of reasonableness in other contexts, beginning with the leading decision in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), the Court has held unconstitutional all attempts to outlaw *prices* as "unreasonable."

The *Cohen Grocery* case involved the validity of a federal statute, known as the Lever Act, which undertook to control prices in World War I by penalizing any person who

"wilfully" made "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" (255 U.S. at 86). The Court had to decide whether these words prohibiting unreasonable prices "constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature of the accusation against them. . . ." From their "mere statement" the Court thought it obvious "that they are not." Nevertheless, the Court articulated the reasons for holding the Lever Act unconstitutional, and its rationale is equally applicable to the "unreasonably low prices" clause here at issue (225 U.S. at 89):

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

Thus, as the Government points out, a vice of the Lever Act was its failure to relate the standard of reasonableness that it invoked "to any point of view, and to a standard or practice discernible from either the historical background of the legislation or the common understanding of persons to whom it applied" (G.B.R. 28-29). But for constitutional purposes the words of the Lever Act and of the "unreasonably low prices" clause are identical. If anything, the Lever Act was the more explicit of the two because the statute itself made its general purpose plain: it was a wartime emergency measure which was expressly designed to eliminate "excessive" prices, prices that would

allow sellers to reap exceptional profits as a result of shortages or other extraordinary circumstances caused by the war (25 U.S. at 81-82 n.1). On the other hand, the purpose of the "unreasonably low prices" clause cannot, as we have seen, be deduced from its context or its history. Moreover, as we shall show, the decisions of this Court hold that its language invokes no known business standard and that the *Cohen Grocery* precedent is applicable whenever "unreasonableness" is made the sole indicator of the illegality of competitive *prices*.

The Court followed *Cohen Grocery* in a series of contemporaneous cases also involving the Lever Act.[26] And in *A. B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233 (1925), it held the Lever Act's blanket proscription of unreasonable prices unconstitutionally indefinite even for civil purposes, pointing out that the cryptic statutory language provided no workable standard by which to determine guilt: "The federal statute contained no provision pointing to what should be deemed a . . . reasonable . . . price; and there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . ." (*id.* at 240-41).

The same question was raised again in *Cline v. Frink*

26. Tedrow v. A. T. Lewis & Son Dry Goods Co., 255 U.S. 98 (1921); Kennington v. Palmer, 255 U.S. 100 (1921); Kinnane v. Detroit Creamery Co., 255 U.S. 102 (1921); C. A. Weed and Co. v. Lockwood, 255 U.S. 104 (1921); G. S. Willard Co. v. Palmer, 255 U.S. 106 (1921); Oglesby Grocery Co. v. United States, 255 U.S. 108 (1921). In Weeds v. United States, 255 U.S. 109, 111-12 (1921), the same rationale voided a different section of the Lever Act purporting to prohibit "conspiracies to exact excessive prices."

Dairy Co., 274 U.S. 445 (1927), this time in an antitrust context, testing a state statute outlawing certain conspiracies in restraint of trade *unless* "their purpose shall be to obtain only a reasonable profit . . ." (274 U.S. at 456). In an opinion by Mr. Chief Justice Taft, the Court unanimously held the statute "so vague and uncertain [that it] . . . violates due process and cannot be distinguished from the case of *United States v. Cohen Grocery Company* . . ." (274 U.S. at 453-54). Such an exception, the Court said, "leaves the whole statute without a fixed standard of guilt . . ." (274 U.S. at 457).

Although *Cohen Grocery* and *Cline* are the leading constitutional decisions in point, the opinion they manifest as to reasonableness as a test of the legality of prices in unregulated segments of our economy is not unique. The Court has repeatedly held that the reasonableness of prices in competitive situations cannot be satisfactorily determined by the courts because of the inherent uncertainty of any concept of "reasonable price" and because the amount of the prices does not determine whether competition has been unreasonably diminished.

Since adoption of the rule of reason as the standard of construction of the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Court has consistently refused to judge the reasonableness of prices in antitrust cases. Explaining this position in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), a price-fixing case, the Court relied expressly on the constitutional decisions, stating per Mr. Justice Stone (273 U.S. at 398):

> "Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making

> the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States v. Cohen Grocery Co.*, 255 U.S. 81; *International Harvester Co. v. Kentucky*, 234 U.S. 216; *Nash v. United States, supra.*"

The Court reiterated these objections to a reasonableness test for prices in the leading case of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). That decision held price-fixing to be unreasonable "per se" because of its inherent inconsistency with free competition. But the Court sharply distinguished its conclusion that the restraint of trade involved was per se unreasonable from the wholly different question of the reasonableness of the prices that had been fixed. With the latter it would have nothing to do. In the language of Mr. Justice Douglas (310 U.S. at 221, emphasis added):

> "If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.
>
> "*The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures.* Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous admin-

istrative supervision and readjustment in light of changed conditions."

It is not surprising therefore that the Court recently noted the relevance of the leading decisions in *Cohen Grocery* and *Cline* to the prohibition in issue here, the "unreasonably low prices" clause of the Robinson-Patman Act. In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 (1958), Mr. Justice Harlan, speaking for the majority, referred to the clause as a "vague provision" and in his opinion observed that, "the District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States* v. *L. Cohen Grocery Co.*, 225 U.S. 81, *Cline* v. *Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-56. . . ."[27]

Indeed, the Court has consistently rejected reasonableness and comparably general indicators of legality as too vague to serve as standards of criminal guilt in complex economic situations. In *International Harvester Co. of America v. Kentucky*, 234 U.S. 216, 221 (1914), the Court invalidated a provision for prices based on "market value under fair competition, and under normal market conditions."[28] The

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27. While the dissenting opinion in the *Nashville Milk* case, by Mr. Justice Douglas, urged that Section 3 is a proper foundation for private suits, the opinion was addressed to the section as a whole and mentioned particularly only its price discrimination prohibitions. The constitutional status of those provisions, however, may be different from the status of the "unreasonably low prices" clause which is not qualified by the more definite requirement of discrimination.

28. The same result was reached in the companion cases of American Seeding Mach. Co. v. Kentucky, 236 U.S. 660 (1915), Collins v. Kentucky, 234 U.S. 634 (1914), and Malone v. Kentucky, 234 U.S. 639 (1914).

Court has repeatedly objected to similar provisions: *Connally v. General Constr. Co.*, 269 U.S. 385, 391-93 (1926), involving "current rate of per diem wages in the locality"; *United States v. Pennsylvania R.R.*, 242 U.S. 208, 237-38 (1916), requiring that railroads provide cars for "normal shipments" on "reasonable request or notice"; *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210 (1932), prohibiting "waste" in the production of crude oil; *Musser v. Utah*, 333 U.S. 95 (1948), prohibiting conspiracies "to commit . . . any act injurious to public health . . . morals . . . trade or commerce." See also *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932), implying that the statute would be unconstitutional if construed as directly prohibiting "unreasonable variations" between actual and marked weight. Cf. *Smith v. Cahoon*, 283 U.S. 553, 564 (1931); *United States v. Cardiff*, 344 U.S. 174 (1952).

The Government has recognized the relevance of this line of cases and indeed devotes several pages of its revised brief (G.B.R. 35-37) to an attempt to distinguish the *Connally* case. But the standard of the *Connally* statute was more definite than the one in issue here. In *Connally* it was at least fairly clear what facts should be taken into account, *i.e.*, current wages in a particular locality, and these facts were simple and clear cut, even though the standard by which to evaluate them was undeterminable. But here by the Government's own account the relevant facts are of formidable number and complexity, while the standard for their evaluation remains nebulous, if not completely subjective. The Government would distinguish the kind of situation involved in *Connally* by having the Court believe that in a trial under the provision in issue here, a jury would never have to decide what the "right price" was (G.B.R. 9, 36-37).

Even if this were true, obviously sellers cannot afford to leave their fate in such doubt. They must be able to tell whether a price is right—*i.e.*, reasonable—or not in order to comply, and under the constitutional requirement of definiteness, they are entitled to know this from the statute.

With respect to prices the experience of this country has been that, when necessary in regulated segments of the economy, the administration of a standard of reasonableness of prices requires, as the opinion in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), states, "continuous administrative supervision and readjustment in light of changed conditions." Accordingly the determination of reasonable railroad rates has been committed to the Interstate Commerce Commission, and of reasonable rates for airlines, natural gas pipelines and other regulated industries to other agencies. The historic doctrine of "primary administrative jurisdiction" was developed first in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), in recognition of the uncertainties inherent in determination of reasonable rates. Under this doctrine the courts refrain from litigating reasonableness issues for the same reasons of complexity and uncertainty which render the "unreasonably low prices" clause invalid as a judicial standard. *United States v. Radio Corp. of America*, 358 U.S. 334, 346-48 (1959).[29]

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29. It should be noted that American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936), which the Government cites (G.B.R. 9, 25, 33), did not involve the validity of a statute but only the validity of a Federal Communications Commission order prescribing a uniform system of accounts for telephone companies subject to the Communications Act of 1934, issued pursuant to authority vested in the F.C.C. by that Act (299 U.S. at 235). The order was

In World War II, Congress avoided the mistake of the unconstitutional World War I Lever Act by establishing an administrative agency under the Emergency Price Control Act for the comprehensive control of prices. The complexities and difficulties which confronted the Office of Price Administration in its monumental task of determining proper price levels are well-known to the Court. Section 3 of the Robinson-Patman Act would call upon the trial courts to decide equally difficult price control questions without standards, experience, or any centralized guidance. And their decisions would have no mere future effect, but would adjudicate, in a criminal proceeding with the liberty of individual defendants possibly at stake, the rightness or wrongness of past conduct.

B. Decisions Relied Upon by the Government Do Not Involve Situations Analogous to the "Unreasonably Low Prices" Clause.

The Government continues to ignore the long line of precedent and experience revealing that the Court has never viewed the common law, antitrust policy, or business practice as endowing prohibitions of unreasonable *prices* with constitutional certainty. In the face of these decisions, the rationale of its defense of the "unreasonably low prices" clause rests on the assertion that some nebulous combination of these traditions does somehow infuse into the other-

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to be administered by the F.C.C. and provided only civil sanctions for its violation. The portion of the order claimed to be too vague, construed by the Court as utilizing fraud as the standard of guilt, presented substantially the same issue that confronted the Court later in a criminal context in United States v. Ragen, 314 U.S. 513 (1942), discussed *infra*, pp. 71-72.

wise vague statutory language enough definiteness to meet minimal standards of the Constitution (see, *e.g.*, G.B.R. 25).

The issue is not, as lengthy arguments in the Government's brief would imply (see G.B.R. 25-30), whether under any circumstances a vague statutory term may acquire meaning from a source outside the statute. It is clear that it may. The problem here is whether *this* statute, the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act, does in fact derive meaning or definiteness from some such outside source. We have shown that as the context in which this clause is read broadens, the clause becomes less, not more, meaningful. We have shown also that an unbroken line of Supreme Court precedent—all of it dealing with prices and therefore directly in point—holds that there is no outside source from which language such as is in issue here can borrow the standard or meaning it needs to become constitutional. In this section we will show that neither the cases cited by the Government nor the common law doctrine of the reasonable man is applicable here to upset that settled and controlling precedent.

The only case the Government cites which had to do with prices is *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922). But the *Levy* opinion recognized that the rule of *Cohen Grocery* would have been applicable if the statute had provided criminal sanctions (258 U.S. at 250). Contrary to the Government's assertions (G.B.R. 28-29), the *Levy* case, which was explained at length in *A. B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233 (1925), is completely distinguishable. The state emergency housing statute in issue included definitions; in the Court's words, it "was not silent as to what should be deemed a . . . reasonable . . . reservation of rent . . . [but] recognized and

named elements which would require consideration . . ." (267 U.S. at 241, emphasis added). And these definitions were written into the statute even though its application was limited to urban real estate income and values which at the time, the Court said, were "stable and easily ascertained" (*ibid.*). The Court contrasted the stability of these values with those that might appertain to commodities of the kind subject to the Lever Act (267 U.S. at 241):

> "While sugar has a market value, that value is subject to fluctuations which individual manufacturers can neither control nor readily foresee. The price in one trade center is affected by that in others, and in all there are material variations, even in short periods."

Obviously, commodities moving in interstate commerce which are subject to the "unreasonably low prices" clause are the same kinds of commodities that the Lever Act purported to regulate. Therefore the *Cohen* and *Small* precedents leave no room for doubt that Section 3's revival of the still undefined Lever Act language is unconstitutional.

The Government's attempt to justify the "unreasonably low prices" language rests primarily on its Procrustean adaptation to this purely economic situation of the common law doctrine of the reasonable man, developed through countless cases over the centuries to measure negligence in situations in which community standards provide a test of reasonable behavior which can be "measured by common understanding and practices." *United States v. Petrillo,* 332 U.S. 1, 8 (1947). As Mr. Chief Justice Taft's exhaustive analysis of the cases in *Cline v. Frink Dairy Co.,* 274 U.S. 445, 464 (1927), shows, however, there is no common law tradition or experience for determining reasonable prices.

Negligence, he said, "is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist . . . ." "But this does not justify," the Court pointed out, ". . . holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect of what is a reasonable price. . . . ." (274 U.S. at 464). "[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result" (274 U.S. at 465).[30]

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30. Accordingly, the other Supreme Court cases cited in the Government's brief (G.B.R. 27-33) are not relevant. The statutes in Ratner v. California, 321 U.S. 755 (1944); Miller v. Oregon, 273 U.S. 657 (1926); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); and Sproles v. Binford, 286 U.S. 374 (1932), relate to negligence situations (see especially the detailed explanation of *Miller v. Oregon* in Cline v. Frink Dairy Co., 274 U.S. 445, 464-465 (1957)). *Boyce* and *Sproles* invoke, beside the common law standard of due care, still more easily ascertainable standards based on distance and actual alternative routes. Standards invoked by the statutes tested in the remaining cases are also definite: United States v. Petrillo, 332 U.S. 1 (1947), discussed *infra*, pp. 72-73 (coercion); Jordan v. DeGeorge, 341 U.S. 223 (1951) (moral turpitude construed by the Court to include *all* crimes involving fraud); McGowan v. Maryland, 366 U.S. 420 (1961) (products actually sold at beaches and amusement parks in the county); United States v. Spector, 343 U.S. 169 (1952) ("timely" defined by the statute to mean six months and "necessary" to mean the legal requirements for entry into an identified country); United States v. Ragen, 314 U.S. 513 (1942), discussed *infra*, pp. 71-73

The Court has also unequivocally rejected the suggestion that *Nash v. United States*, 229 U.S. 373 (1913), which upheld Section 1 of the Sherman Act, dictates a contrary result. Indeed, the Court expressly considered the *Nash* precedent in both the *Cohen Grocery* (255 U.S. at 92) and *Cline* opinions, and in both it readily distinguished the question of unreasonable restraint of trade from that of unreasonable prices.

Section 1 of the Sherman Act was upheld in *Nash* because its language referred to and attained certainty from the settled "common law as to restraint of trade . . . taken up by the statute . . ." (229 U.S. at 377). The Sherman Act, this Court has more recently pointed out, "made a standard long recognized by the common law the statutory test." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). As Mr. Chief Justice Taft explained in *Cline* (274 U.S. at 460), in *Nash* "we held that the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute." Quoting from his early and now celebrated opinion in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 283-84 (6th Cir. 1898), he said that the question of undue restraint of trade does not rest on so " 'shifting, vague, and indeterminate a standard' " as does that of the "reasonableness of prices" (274 U.S. at 462).

In the first oral argument of this case, several related

(fraud). In Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 16-18 (1931), the state court had already given the statutory language a precise and workable construction based on the industry's technological developments known to all affected by the statute.

questions were raised concerning the distinction, as to definiteness, between the clause in issue and the Sherman Act's "rule of reason." Accordingly, we would like to point out the substantial reasons for this distinction to which the Court has uniformly adhered in both the constitutional cases, including *Cohen Grocery* and *Cline,* and the antitrust cases, including *Trenton Potteries* and *Socony-Vacuum.* The difference in essence is that there are no accepted or ascertainable standards known to the criminal law for deciding when a price is "unreasonable." On the other hand, the "rule of reason" as applied to restraints of trade has a clear meaning evolved through over 200 years of common law precedent and statutory interpretation, and it was this established meaning to which Mr. Justice Holmes referred in *Nash,* and Mr. Chief Justice Taft in *Cline.*

The rule of reason is believed to have originated in *Mitchel v. Reynolds,* 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711). Since its adoption as the rule of construction of the Sherman Act, in *Standard Oil Co. v. United States,* 221 U.S. 1 (1911), it has been applied to render illegal only those contracts, combinations and conspiracies which unduly restrict competition, while not invalidating those which have only an insubstantial effect. *Att'y Gen. Nat'l Comm. Antitrust Rep.* 11 (1955). Under this test, reasonableness is a measure of the extent to which a given arrangement reduces competition. It applies to only a limited class of business arrangements, which are unusual and are set apart from the general run of commercial activities because they all involve agreements which restrict competition. It applies only to reduce, not to enlarge, the number of such agreements to be held illegal.

Moreover, the great majority of cases brought under the

Sherman Act fall into classes of restraints which have been held by the Court to be inherently or per se unreasonable. In this respect, the law is especially definite in a constitutional sense: *i.e.*, price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); division of territory, *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); boycotts, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and tying restrictions imposed by dominant sellers, *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

In contrast, the "unreasonably low prices" phrase has no common law or statutory meaning whatever. It has acquired none through decisions. It would measure something totally different from what the rule of reason measures, *i.e.*, the dollar and cents level of a price, not whether competition has been reduced. It would apply to every commodity price transaction in commerce, rather than to a relatively small group of special agreements. It envelops low prices generally in a cloud of potential illegality whereas the rule of reason operates to reduce and ameliorate the criminal incidence of the law on restraints of trade. When read in terms of their legal significance, the Sherman Act test has a meaning firmly fixed to the most reliable of guideposts, but the "unreasonable price" test is not moored to any known standard which a court can administer.

Long ago, economic society abandoned the Middle Ages idea of a "just" price.[31] Ever since, morality and ethics have

31. See HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 101 (Northwestern Univ. Press, 1961.)

not provided either a legal or a business standard for the measurement of price. In private transactions in the unregulated segment of the economy to which the antitrust laws are applicable, prices are determined by contract of the parties under market conditions usually involving competition. Although courts adjudicate disputes as to the terms of contracts, they do not attempt to judge in private legal actions whether prices are too high or too low. For the unregulated portion of the American economy, it is a basic legal and economic postulate that prices will be determined, not by moral or legal restraint, but under the constraints imposed by competition in the market. This freedom of prices to move according to the pressures of a competitive market price system is so vital that the Court, in the opinion by Mr. Justice Douglas in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), has called it the "central nervous system of the economy."

Plainly, Mr. Justice Holmes' further observation in *Nash*, that "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree" (229 U.S. at 377), refers to the fact, noted by the Government (G.B.R. 26), that the application of all statutes, written as they are in general terms, is allowably subject to some doubt in particular cases, and uncertainty merely as to the outcome of particular cases is not unconstitutional. But Mr. Justice Holmes certainly did not mean that criminal statutes need have no definiteness or ascertainable standards. His later decision in *International Harvester* made it clear that substantial uncertainty as to the meaning of a statute on its face is unconstitutional, and the opinions in which he joined in *Cohen Grocery* and *Cline* show clearly that an attempt to

prohibit unreasonable prices, without more, involves statutory uncertainty of the kind that is unconstitutional.

Like the Sherman Act, the statute involved in *United States v. Ragen*, 314 U.S. 513 (1942), another case on which the Government relies, has a common law foundation. The *Ragen* statute prohibited wilful tax evasion. The case actually involved no attack on the statute on its face, which, as the Court pointed out, "standing alone, is not vague" (314 U.S. at 523). Obviously, whether a businessman has been guilty of tax evasion is a question that invokes an objective and familiar common law standard of determination, *fraud*. No such standard is present when the question is merely whether he has set an "unreasonable" price. "[S]uch acts of bad faith," the Court observed, "are not beyond the ready comprehension either of persons affected . . . or of juries called upon to determine violations . . ." (314 U.S. at 524). The issue actually posed to the Court in *Ragen* was the statute's application to the particular case, and the Court held that its application to the deliberate padding of business expenses for which the statute allows "reasonable" deductions was not too uncertain. The allowability of reasonable deductions did not, the Court held, "so transform the nature of the offense as to make actors less aware that they are committing it or juries less competent to detect it" (*ibid.*).

Moreover, even if the statute in *Ragen* were in point, the application of that statute dealt with a comparatively simple situation, a corporate income tax return filed long after the fact. Every relevant fact was fixed: the services rendered, the compensation paid, the reasons, and the pertinent market conditions. A deduction claimed under such

known circumstances is not comparable to a price set, as any price must necessarily be, for the future and on the basis of estimates, projections, and pure guess. Indeed, the Court's opinion in *Ragen* expressly distinguished *Cohen Grocery* on just this basis: where an unreasonable price was prohibited, no standard was afforded (255 U.S. at 89, 92), whereas in the tax evasion situation "no such unworkable standards" were involved (314 U.S. at 523).

Similarly in *United States v. Petrillo,* 332 U.S. 1, 6 (1947), where the Court upheld a statute which prohibited coercing an employer to hire more employees than were "needed to perform actual services" because "persons of ordinary intelligence would . . . know when their compulsive actions would force a person against his will to hire employees he did not need," the facts to be evaluated were ascertainable. The statute required, moreover, not just wilfulness, but *coercion*. While the Court agreed that it was still necessary to determine the need and that the employer's opinion as to the number of persons he needed should not be conclusive, it is clear that the number of relevant factors would in any case be few and would always have as a firm standard for comparison the *actual* services to be performed. Moreover, the "need" invoked as one standard in the statute in *Petrillo,* unlike the "reasonableness" standard in issue here, *is* a standard in actual use in all businesses—by employers, employees, and union leaders. Decisions on the number of employees to hire are in fact made on the basis of what is needed to do the work to be done. It is a problem constantly faced and solved in all businesses. Accordingly, the Court held the statute sufficiently definite "when measured by common understanding and practices" (332 U.S. at 8).

Thus the statutes involved in both *Ragen* and *Petrillo* deal with comparatively uncomplicated situations in which the principal facts, actual expenditures and actual services, cannot be in doubt. Moreover, each of those statutes required proof, in accordance with ascertainable common law standards, of fraud or coercion, and both were clearly practicable in operation. The Court's remark that under the *Ragen* statute, "thousands of corporations have filed income tax returns . . . and there has not been any apparent general confusion . . ." (314 U.S. at 524), contrasts markedly with its observation of the evident unworkability of the "unreasonably low prices" clause of Robinson-Patman: "It is worthy of note that the Department of Justice has never, so far as we have been able to determine, brought proceedings under this provision . . . ." *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 n.7 (1958).

The obtuse complexity of the "unreasonably low prices" clause is well-illustrated, as pointed out above, by the Government's strained attempts to say here what the statute it has so belatedly invoked means. The clear judgment and experience of the Court, developed in a long line of cases, is that workable standards are not afforded for those subject to a statute, or for judge and jury, when, as here, the legality of a price in criminal cases is made dependent on its "reasonableness." The Government's showing does not diminish or deflect the force of this precedent but points instead to the especial propriety of following it here.

C. The Statute's Failure to Make the Act Proscribed Ascertainable Is Not Remedied by Its Requirement of a Specific Intent.

As the preceding section has shown, the law is settled that the phrase, "unreasonably low prices", taken alone is

too vague and indefinite to constitute a constitutionally adequate description of a criminal act. The Government continues to argue, however, that the additional statutory requirement for conviction, a showing that the unreasonable price was set with a specific intent, changes the constitutional result (G.B.R. 23-24).

Its argument is no longer premised, as it was in its first brief, on the claim that the intent required by this statute is bad faith or criminal scienter of the kind present by judicial construction in the statutes tested in *Screws v. United States*, 325 U.S. 91 (1945), and *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961) (G.B.R. 23-24). The Government now recognizes, as Mr. Justice Douglas stated in *Screws* and as the Court unanimously held in *Cramp*, that "wilful conduct cannot make definite that which is undefined." 325 U.S. at 105; accord, 368 U.S. at 283-84. To require intent of that sort would not, after all, detract from *Cohen Grocery* and *Cline* as controlling precedents. Since the prohibition of the Lever Act was limited to wilful acts and the Colorado statute invalidated in the *Cline* case permitted such combinations in restraint of trade as had a reasonable purpose, the Court would have upheld the statutes in those cases if a requirement of wilfulness or bad faith were enough to save an otherwise unconstitutionally vague statute.[32]

The Government has therefore abandoned its reliance on *Screws* and now not only concedes, but emphasizes, the separateness and independence of the constitutent elements of the crime this statute purports to create (G.B.R. 18, 24). But the Government has failed to acknowledge that this

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32. These cases are discussed in greater detail at pp. 35-40 of appellees' original brief on the merits.

fact increases, rather than decreases, the uncertainty of the statute. Where there is no necessary relationship between the act proscribed and the specified intent, the statutory intent, unlike the requirement in *Screws* and in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925), that a particular statute be wilfully violated, could accompany, as we have already shown, almost any routine and innocent business act. Accordingly, it differs completely from the kind of intent involved in all the decided cases in which intent has been considered to be of some aid to certainty.

That the purpose requirement here does not clarify the meaning of the provision in issue is shown by the sections of the Government brief purporting to state in practical terms what proof will be adduced to show a violation of the dual requirements of this statute. As we have pointed out, on the basis of its proffered test of a price claimed to be "below cost," the Government will invite judicial presumptions not only of unreasonableness but of intent to destroy competition. If, however, this resort to fiction exemplifies the Government's claim that the intent requirement clarifies the statute and eliminates the danger of a purely subjective determination of guilt by judge or jury (see G.B.R. 23), then surely its "assurance of protection" is, as Mr. Justice Jackson warned, "a hoax" because "*the requirement of specific intent is now to be wiped out with a presumption.*" *Koehler v. United States*, 342 U.S. 852, 854 (1951) (dissenting from denial of certiorari) (emphasis added).

Nor is the Government's position any more tenable when it discusses the statute generally. When all the verbiage is culled away, we have shown that what is really suggested is that unreasonableness means acting with the proscribed intent. But there is clearly no warrant in the statute

itself for this kind of circumlocution. As we have pointed out, the Government itself in its general analysis of the statute not only admits that the statute's tests are independent but states that Congress deliberately refrained from passing a statute proscribing "all sales 'for the purpose of destroying competition or eliminating a competitor' " and, indeed, adds that such a statute would be "open to serious objections" (G.B.R. 18). Yet this is exactly the construction urged when the Government comes to defend and apply the very different statute Congress actually enacted. Construction of a statute in a manner so clearly at variance with "the natural import of its terms" (*United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932)) would, contrary to the Government's representation, in itself constitute a deprivation of fair warning. *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952).

Moreover, as the Government points out, a "goal of antitrust policy is to provide purchasers the highest quality of goods at the lowest price," and in a competitive society this will normally result in the elimination of inefficient competitors through price competition (G.B.R. 18). From the point of view of the individual businessman, this process of competitive pricing seems a very real—and sometimes personal—rivalry. Although he sets his prices with the primary purpose of retaining and even increasing his share of the total business, he must take his competitors' prices into account and, as a practical matter, he knows that if his share increases, those of others will in all probability decrease. The competitive businessman is, we submit, careless, if not hopeful, of this result.

In its first brief to this Court (at p. 20) the Government

argued, quoting from *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952), that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." While the Government no longer expressly relies on that quotation, its proffered interpretations of the statute display the same philosophy. But it is manifestly unfair to impose the risk of criminal conviction when no legal line is visible, and then to add that the seller will be found guilty if as he approaches the unseen line his attitude is the one he is ordinarily encouraged to have. It is not "familiar to the criminal law" to make anyone take such a risk. *United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

III. THE ISSUE BEFORE THE COURT IS THE CONSTITUTIONALITY OF THE PROHIBITION OF "UNREASONABLY LOW PRICES," AND NOT OF SALES BELOW COST.

Retreating from the insupportable position taken in its original brief to this Court, that the indictment rather than the statute governs the issue of unconstitutional vagueness, the Government now concedes the "settled rule that if the challenged provision of the statute is itself so vague and uncertain as to be repugnant to due process, specification of the details of the offense in the indictment will not serve to validate the statute" (G.B.R. 48). Nevertheless, it continues to urge that the question here is limited to "the constitutionality of this statute *as applied to the litigant* and . . . [not the general validity of the statutory provisions . . ." (G.B.R. 43, emphasis added; see also 48-49), and in reliance on this proposition the Government has now for the first time expressly bound itself to limit its proof at trial to showing "sales below cost" (G.B.R. 45-48).

Appellees have never conceded, and do not now concede, that the statute gives warning of the illegality of the offenses described in the illustrative second paragraphs of the Robinson-Patman counts of the indictment. The Government's contrary statement of our position at page 49 of its latest brief is wholly wrong. Our contention is and has always been that the statutory clause at issue does not give adequate notice or fair warning of what conduct it proscribes, whether the conduct specified by way of example in the indictment or any other.

Our analysis of the language of the statute, made as an aid to the Court in determining its constitutionality, has however been an analysis of the statute on its face—and not, as the Government would like it to be, an analysis that assumes the statute already to have been authoritatively construed as a prohibition against "sales below cost". We have shown that the language of the statute itself does not lend itself to any interpretation—the one proffered by the Government or any other—that would be meaningful to those to whom it is to be applied.

A. The Indictment is Not Limited to "Sales Below Cost."

Each Section 3 count contains two paragraphs under the heading, "Offense Charged—Robinson-Patman Act" (Counts Two, R. 9; Four, R. 12; Six, R. 15; Eight, R. 18; Ten R. 22; Thirteen, R. 28; and Fifteen, R. 32). The first, paraphrasing the statute, alleges that one of the defendants "sold milk . . . at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" of the Robinson-Patman Act. The second paragraph adds that "pursuant to and in effectuation of the offense charged" in

the preceding paragraph the defendant utilized advantages of operating in many geographical localities to finance a price war against small competing dairies "by intentionally selling milk . . . at prices below National's cost."

As the second paragraph states, the "offense charged" is that alleged in the first paragraph, where the allegations are not in terms of sales below cost, but are in the language of the statute, "unreasonably low prices." The Government recognizes that the statutory phrase was intended to cover sales at "unreasonably low" prices whether above or below "cost" (G.B.R. 42). This language should not be read differently when used verbatim in the charging paragraphs of the indictment. If the indictment had been intended at the time it was drawn to be limited as the Government now argues, it would simply have alleged in one paragraph that defendant had sold milk at prices below cost in violation of the "unreasonably low prices" prohibition.[33] Cases cited by the Government suggesting that the specification would have had that effect if it had appeared in a bill of particulars are hardly relevant here where no such bill has been filed and the claimed particularization appears in the indictment itself, introduced by language which shows that it is illustrative rather than limiting. The Government cites no case involving an indictment with language paralleling the language it used to draft this one.

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33. This is the method actually followed in the Sherman Act counts of the indictment where the type of restraint charged is alleged as part of the overall allegation of violation, viz., "a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk . . . in unreasonable restraint of" trade (*e.g.*, Count One, R. 7), and accordingly can hardly be argued to be a form unfamiliar to those who drafted the indictment.

Representations made by Government counsel to the trial court established the indictment as having a broader scope than below-cost sales. In the course of the oral argument counsel undertook to summarize how the Government would attempt to show the unreasonableness of defendant's prices (R. 114). The court then asked whether the case against defendants was limited to sales below cost. Government counsel expressly stated that it was not so limited (R. 115):

> "The Court: Well, do you understand that it is a requirement that to be an unreasonably low price it must be below cost?
>
> "Mr. Eisen: No, it does not have to be below cost."

Defendants' counsel recognized, as the indictment makes clear, that "one argument" the Government was making was that a "sale below cost" was an unreasonably low price within the meaning of Section 3 (R. 95; see G.B.R. 46 n. 5), and, quite naturally, he answered that Government contention, among others. But the record shows clearly that all counsel and the court below recognized that both the applicable constitutional doctrine and the indictment squarely raised the question of the constitutionality of the statute on its face.

Neither the Government brief below, nor the written statements on behalf of defendants (R. 33, 71), interpreted the indictment as limited to sales below cost. Relying expressly on those briefs (R. 121-22), both the trial court's oral opinion and its order of dismissal construed the indictment as a general allegation of unreasonably low prices (R. 122-23).

The district court held the clause in issue here, on which

the indictment before it was based, so vague and indefinite as to violate the due process and notice requirements of the fifth and sixth amendments and therefore unconstitutional on its face. On the basis of that holding the Government invoked the jurisdiction of this Court under the Criminal Appeals Act to review directly a district court judgment "dismissing any indictment . . . where such . . . judgment is based *upon the invalidity . . . of the statute* upon which the indictment is founded . . ." (34 Stat. 1246 (1907), 18 U.S.C. § 3731 (1958), emphasis added) The Government in its Notice of Appeal described the indictment as "charging defendants with charging unreasonably low prices . . ." and did not so much as mention sales below cost (R. 124-25). The Notice stated without any qualification that the question presented by this appeal is whether the "unreasonably low prices" clause of the Act is constitutional (R. 124-25). Indeed, not until this second brief on the merits has the Government gone so far as to state expressly that it considers itself to be limited at trial to evidence of sales below cost (G.B.R. 45-48).

We appreciate that these representations would be binding on the Government if there were a trial on the Robinson-Patman counts. But the Government's narrow interpretation of the indictment offered on appeal, even if the scope of the indictment were relevant, is powerless to limit the scope of the appeal and the issue before this Court. Whatever the Government may now stipulate with respect to the indictment, the construction of it by the trial court is controlling for any purposes to which it may be pertinent in this appeal under the Criminal Appeals Act. *United States v. Winslow*, 227 U.S. 202, 216-17 (1913); *United States v. Borden Co.*,

308 U.S. 188, 193 (1939); *United States v. Jones*, 345 U.S. 377, 378 (1953). There can be no dispute that the trial court never indicated any intention to treat the indictment as limited to "sales below cost."

B. The Language of the Statute, Not of the Indictment, Must Be Tested.

Under the decisions of the Court the scope of the indictment has no relevance to the question of statutory vagueness. The vagueness doctrine deals with a defect inherent in the statute itself, one which renders the statute void for any purpose. The Court will not, of course, make a pronouncement of unconstitutional vagueness without having before it a genuine case or controversy, involving a defendant who can show that he will be injured by the statute's enforcement. But standing "to attack the . . . statute upon the ground that it is so vague as to deprive him of liberty or property without due process of law . . ." inheres in anyone who " 'has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement.' " *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 283-85 (1961), quoting *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

The indictment could be relevant to such an attack only if the peculiar facts of the cases were somehow relevant. The question would then be one best decided after trial. But a vagueness issue could never be decided on an appeal under the Criminal Appeals Act if this theory were accepted since at that stage the facts are still unknown. So far as we have been able to determine, however, in every case brought to this Court, as in the instant case, on direct appeal under the Criminal Appeals Act after a district court had held an

act of Congress unconstitutional for vagueness, this Court has looked to the face of the statute to determine the constitutional issue: *United States v. Harriss,* 347 U.S. 612 (1954); *United States v. Five Gambling Devices,* 346 U.S. 441, 453-54 (concurring opinion), 456-59 (dissenting opinion) (1953); *United States v. Kahriger,* 345 U.S. 22, 33-34 (1953); *United States v. Spector,* 343 U.S. 169 (1952); *United States v. Petrillo,* 332 U.S. 1 (1947); *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932); *United States v. Wurzbach,* 280 U.S. 396 (1930); *United States v. Alford,* 274 U.S. 264 (1927); *United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921); cf. *United States v. Evans,* 333 U.S. 483, 495 (1948); *United States v. Classic,* 313 U.S. 299, 309 (1941).[34] The application of the same rule with respect to a state statute is most recently illustrated by the Court's unanimous decision in *Cramp v. Board of Pub. Instruction,* 368 U.S. 278 (1961), holding a state statute unconstitutional on its face.

The present case is indistinguishable in this respect from, for example, *United States v. Petrillo,* 332 U.S. 1 (1947), which involved an information drawn in much the same form as the indictment here (332 U.S. at 5). The Court there held that the question "squarely" raised by the appeal under the Criminal Appeals Act was "whether the section invoked in the indictment is void in toto, barring all further actions under it, in this, and every other case"

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34. In United States v. Wurzbach, 280 U.S. 396 (1930), there is substantial discussion of the details of the indictment, but this consideration clearly came only after the Court had determined that the statute challenged was valid on its face, "perfectly intelligible" (*id.* at 398).

(*id.* at 5-6). The Court stated further that "whether the contested section is written so vaguely and indefinitely that one whose conduct is affected could only guess what it meant" was a question then "ripe" for decision (*id.* at 6).

The Government concedes that a statute may be examined on its face provided the constitutional question involves statutory vagueness "in the area of First Amendment liberties" (G.B.R. 50). But the cases support no such limitation. On the contrary, the Court's ability to protect First Amendment liberties threatened by vague statutes derives from the vagueness doctrine itself, not from some special exception to it, as the Court's opinions in *Winters v. New York,* 333 U.S. 507, 518-19 (1948), and *Cramp v. Board of Pub. Instruction,* 368 U.S. 278, 283-88 (1961), unequivocally demonstrate. It should be emphasized, however, that the cases on which appellees place their primary reliance, both with respect to the scope of the issue and its merits, are not cases involving First Amendment problems. They are cases in which the civil right imperiled is simply the basic right the vagueness doctrine was directly designed to protect, freedom from "exaction of obedience to a [statutory] rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Ref. Co. v. Corporation Comm'n,* 286 U.S. 210, 243 (1932).

A statute which embodies no ascertainable standard of guilt is, under the decided cases, unconstitutional on its face; obviously it cannot, even in the most extreme circumstance, be constitutionally applied. The clear statements of this Court to this effect in *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939), and *United States v. Spector,* 343 U.S. 169, 171 (1952), cannot be distinguished, as the Gov-

ernment suggests (G.B.R. 50), but go to the heart of the problem that application of the vagueness doctrine poses to this Court. In *United States v. Harriss,* 347 U.S. 612 (1954), another case involving the quashing of an indictment brought under a federal statute, and one on which the Government still seems to rely (G.B.R. 44), the Court, though divided on the merits, was unanimous in rejecting the Government's claim that the question was merely whether the statute's application to the particular situation described in the indictment was unconstitutional (347 U.S. at 617, 629 (dissent of Douglas, J.), 633 (dissent of Jackson, J.).

Contrary to the assertions in the Government's brief, *Robinson v. United States,* 324 U.S. 282 (1945), enunciates no different rule. The majority there saw the case simply as one of statutory construction. It was only after the Court had construed the statute and determined that it had been correctly applied by the court below that the opinion turned to what was obviously a rather makeweight vagueness argument. Deeming the contention frivolous, the Court pointed out that the words in question, "liberated unharmed", contained no more uncertainties than "lurk" in "most English words and phrases" (324 U.S. at 286). The congressional purpose was, it held, "clearly expressed" (*ibid.*). Only under these circumstances, when it had determined that the statute was clearly *not* unconstitutionally vague, did the Court observe that it was unnecessary to consider the outcome of hypothetical cases that might never arise (*ibid.*), that is, whether a statute that successfully describes the "general class of offenses to which [it] . . . is directed . . ." (*United States v. Harriss,* 347 U.S. 612, 618 (1954)), and so is constitutional on its face,

might in a marginal case be susceptible of unconstitutional application.

Neither do the remaining cases cited by the Government support its position. None involved vagueness issues, and no attack on the statutes themselves was entertained, although in *United States v. Raines*, 362 U.S. 17 (1960), the Court expressly recognized that a challenge to a statute for vagueness presents a situation in which the statute must be judged on its face (*id.* at 22, 24). Three of the cited cases (G.B.R. 44) involved situations in which it had not been shown that those who brought the actions, which were for injunction or declaratory judgment, would be injured by enforcement of the challenged statutes. Accordingly, they turned on the question of the existence of a case or controversy. The natural reluctance of the Court to entertain actions brought to vindicate the rights of third parties (*Barrows v. Jackson*, 346 U.S. 249, 255 (1953)) or to rule on the constitutionality of a state statute before the state courts had been given an opportunity to construe it (*Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 459, 462, 470-71 (1945)) or to comment on the "political expediency" of an act of Congress (*United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)) has little to do with the case at bar.

The threat to appellees here is hardly "hypothetical." Both have been indicted in the words of a federal statute. Both risk criminal conviction. The Court's comment in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 457 (1927), is particularly apt: "the whole statute [is] without a fixed standard of guilt in an adjudication affecting the liberty of the one accused."

The vagueness in the statute here is not merely the ambiguity of everyday English, but is that of a statute which by the Government's own description can be approached only by those having expertise not only in the language, but in "American history and the evolution of antitrust law" (G.B.R. 25), and in the elusive "standards of the business community" in an imaginary situation in which the forces of competition are to be largely ignored. In this case the Government's position is that if in the indictment an extreme case is alleged, it does not matter that the statute contains no standard of guilt and does not describe the general category of offenses proscribed. This is not the rule of the vagueness cases but a complete reversal of it, one which no authority supports.

CONCLUSION

It is therefore submitted that the decision of the District Court dismissing the Robinson-Patman Act counts of the indictment on constitutional grounds was entirely correct and should be affirmed.

Respectfully submitted,

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APPENDIX

This appendix sets forth the full texts of Sections 1 and 3 of the Robinson-Patman Act (49 Stat. 1526-28 (1936)) as they appear in the United States Code (15 U.S.C. § 13, 13a (1959)).

SECTION 1

Section 1 of the Robinson-Patman Act, known as Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is as follows:

"§ 13. Discrimination in price, services, or facilities.
(a) Price; selection of customers.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, how-*

ever, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing contained in said sections shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing contained in said sections shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) **Burden of rebutting prima-facie case of discrimination.**

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Com-

mission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishings of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) Payment or acceptance of commission, brokerage or other compensation.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) Payment for services or facilities for processing or sale.

"It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with

the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) **Furnishing services or facilities for processing, handling, etc.**

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) **Knowingly inducing or receiving discriminatory price.**

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. (Oct. 15, 1914, Ch. 323, §2, 38 Stat. 730; June 19, 1936, Ch. 592, §1, 49 Stat. 1526.)"

SECTION 3

Section 3 of the Robinson-Patman Act is as follows:

"**13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.**

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party

to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. (June 19, 1936, Ch. 592, §3, 49 Stat. 1528.)".